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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

CITY AND COUNTY OF SAN FRANCISCO, *ET AL.*,

Petitioners,

vs.

WILL STONE, *ET AL.*,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the proper standard for holding a government defendant in contempt for violating a consent decree governing jail conditions whether the government has been reasonably diligent in seeking to comply with the decree, or is the proper standard whether the government has taken every reasonable step to comply?

2. In measuring the reasonableness of a government defendant's efforts to comply with a consent decree governing conditions of confinement, should a court consider the financial constraints on the government defendant?

3. To avoid contempt for violating a consent decree governing jail conditions, must a defendant prove that the cause of the violation was unforeseeable?

4. Did the Court of Appeals err in suggesting that if other sanctions fail to assure compliance with a consent decree, the district court may authorize, over objection, the early release of inmates sentenced by state courts?

LIST OF ALL PARTIES

Petitioner City and County of San Francisco is a municipal corporation and a political subdivision of the State of California. The Department of Public Health for the City and County is a department of the executive branch of the government of the City and County of San Francisco. The remaining petitioners, sued in their official capacities, include the Mayor and the Sheriff of the City and County of San Francisco.

Respondents Will Stone, Henry Washington, Albert Mateus, Freddie Tooks, and Joanne Sparks were inmates of Jail No. 1 of the City and County of San Francisco, and filed this suit on behalf of all inmates similarly situated.

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Petitioners City and County of San Francisco ("San Francisco"), *et al.* respectfully pray that a Writ of Certiorari be issued to review the judgment and the opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding. The Ninth Circuit held that the United States District Court for the Northern District of California did not abuse its discretion in finding San Francisco in contempt for violating a consent decree governing conditions at one of San Francisco's jails. *Stone v. City and County of San Francisco*, 968 F.2d 850 (9th Cir. 1992).

INTRODUCTORY STATEMENT

This case presents an issue of national importance: the proper standard for holding a government defendant in contempt for violating a consent decree governing jail conditions. The issue is of nationwide concern because so many jails and prisons operate under such decrees: "On June 24, 1990, 234 of the Nation's 957 State prisons (24%) were operating under a court order or consent decree relating to the conditions of confinement or specific practices within the facility." Bureau of Justice Statistics, *Prisons and Prisoners in the United States*, p. 9 (April 1992). As of 1988, "12% of jails nationwide were under Federal or State court orders for specific conditions of confinement, and 78% of these were ordered to limit the size of the populations they housed." *Id.*, p. viii.

Jail No. 1 in San Francisco is among that 12 percent. On December 17, 1991, the United States District Court for the Northern District of California held San Francisco

in contempt for violating population limits set by a 1982 consent decree governing that jail.[1]

The district court made this ruling on the grounds that San Francisco had not "taken every reasonable step" to comply with the decree. The "reasonable steps" that the district court said that San Francisco could have taken included the unilateral termination of a contract with the United States Marshall to house federal prisoners at the jail, even though the court had before it no evidence concerning the contract or its $2 million liquidated damages clause. As another "reasonable step," the district court suggested that the Sheriff could use a jail gymnasium as a dormitory, even though the district court had no evidence before it concerning the impact of this alternative on the other rights of inmates.[2] Without identifying which steps San Francisco might reasonably have taken, on June 25, 1992, the Ninth Circuit affirmed the district court's decision.

The lower courts' approach here reflects the problem with requiring government defendants in institutional reform litigation to take "every reasonable step" to assure compliance, regardless of the officials' good faith, their

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[1] The December 17, 1991 Order, along with its modifications of December 18 and December 30, 1991, are collectively referred to in this petition as "the Order."

[2] The district court made these suggestions *sua sponte* at the end of a December 30, 1991 hearing on San Francisco's motion to stay the Order. San Francisco had no opportunity to present evidence to rebut the court's view that these steps were "reasonable." When San Francisco subsequently followed the district court's suggestion that inmates be placed in the gymnasium, the district court fined the city $473,400 for doing so. *See* fn. 3 *post.*

diligence, and the reality of diminishing resources. There is always one more "reasonable step" imaginable. Recent decisions of this Court strongly suggest that in cases involving consent decrees governing jail conditions, local officials who act in good faith and with reasonable diligence should not be held in contempt. At least three other circuits use this standard.

Under a reasonable diligence standard, San Francisco would not have been held in contempt. In the nine and one-half years between the signing of the consent decree in this case and the present appeal, San Francisco has spent more than $30 million to improve jail conditions and comply with the decree. The city is currently building a new, 400-bed facility that will open next year, having completed a 300-bed facility in 1989. In addition, San Francisco has adopted the most liberal pretrial release policies in California, created a wide range of programs as alternatives to incarceration and worked with local judges to reduce the jail population.

In the interest of advancing a uniform standard among the circuits and under the burden of an erroneous order resulting in fines of more than $2.7 million, San Francisco seeks certiorari from this Court.[3]

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[3] The Court of Appeals stayed all fines while the appeal was pending. Following issuance of the Ninth Circuit's mandate on August 31, 1992, however, the district court retroactively imposed $2.79 million in fines that accrued while the stay was in effect. The district court is currently reconsidering the validity of these retroactive fines, including the fines referred to in footnote 2 *ante*. Thus, the fines *per se* are not at issue in this petition.

OPINIONS BELOW

The June 25, 1992 opinion of the Court of Appeals for the Ninth Circuit, as amended on July 9, 1992 and August 25, 1992, is reported at 968 F.2d 850, and is reprinted as Appendix A to this petition.

The December 17, 1991 Order of the United States District Court for the Northern District of California (Orrick, D.J.), along with the District Court's amendments of December 18 and December 30, 1991, are reprinted as Appendix B to this petition.

JURISDICTION

Respondents Will Stone, *et al.* ("the inmates"), filed this class action on December 1, 1978, in the Northern District of California, invoking federal jurisdiction under 42 U.S.C. § 1983. The District Court's jurisdiction was based on 28 U.S. C. §§ 1331 and 1343. The parties signed a consent decree to settle the action on July 15, 1982.

On December 31, 1991, petitioners filed in the Ninth Circuit their appeal of the district court's December 17, 1991 contempt order, invoking jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1292(a)(1). On June 25, 1992, the Ninth Circuit entered a decision holding, among other things, that appellate jurisdiction of the contempt order existed pursuant to 28 U.S.C. § 1291 because the contempt finding was made in a post-judgment order. See Appendix A, p. A-7, *infra*.

The jurisdiction of this court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Procedural Background

This class action was filed on December 1, 1978. It alleged a variety of unconstitutional conditions in the San Francisco County Jail system.

The action was resolved by a consent decree signed on July 15, 1982. The decree governs conditions only at County Jail No. 1.[4] Among other things, the decree provides that individual units in the housing areas of Jail No. 1 should not regularly house more inmates than the capacity set by the California Board of Corrections. The total rated capacity for Jail No. 1 is 426 inmates.

In 1985, the inmates filed their first motion for contempt, alleging various failures to comply with the decree. This motion was resolved in May 1986 by an agreement to appoint Special Master Allen Breed.

In November 1987, the inmates renewed their motion for contempt on grounds of non-compliance with the population limits at Jail No. 1. With San Francisco in the process of planning and building a new jail facility at San Bruno (Jail No. 7), the district court held the motion under submission while the new facility was being completed.

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[4] County Jail No. 1 is a jail on the sixth floor of San Francisco's Hall of Justice. San Francisco has three other jails: County Jail No. 2 is a jail on the seventh floor of the Hall of Justice; County Jails No. 3 and No. 7 are located in San Bruno, California.

In March 1989, with the new San Bruno facility opened, the city returned to compliance with the population limits at Jail No. 1. On June 19, 1989, the district court extended the consent decree beyond its seven year term and denied the pending motion for contempt.

Beginning with the opening of the new San Bruno facility in March 1989, San Francisco remained in compliance with the population limits at Jail No. 1 for approximately 2 years. On May 30, 1991, the inmates filed the motion for contempt at issue here, seeking sanctions for the crowding at Jail No. 1 that had occurred since April 1, 1991.[5]

Following further hearings in July and November 1991, on December 17, 1991, the district court held San Francisco in contempt. The court ordered the city to pay daily sanctions of $300 for each inmate held above the rated capacity of each housing unit at Jail No. 1 after January 1, 1992. The district court also authorized San Francisco's sheriff to release sentenced inmates at 50% of their sentences if necessary to comply with the inmate population limits, and to override provisions of state law which restricted various alternatives to incarceration.

On December 26, 1991, San Francisco filed a motion requesting that the district court stay, or in the alternative, reconsider its Order. On December 30, 1991, the

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[5] The first instance of exceeding the population limits occurred on February 19, 1991. While sporadic overcrowding continued into March, the more persistent crowding that prompted the inmates' motion began on April 1, 1991.

district court denied the stay, but modified its decision in two respects not relevant to this petition.[6]

On December 31, 1991, San Francisco filed its notice of appeal. On the same day, the city filed in the Ninth Circuit a motion to stay the Order pending appeal. Later that day, the Ninth Circuit temporarily stayed the Order.

On January 8, 1992, the Ninth Circuit expedited the appeal and stayed the Order pending its resolution.

On June 25, 1992, a three-judge panel of the Ninth Circuit affirmed the district court's finding of contempt and vacated the portion of the Order authorizing "50% releases" and the overriding of state law.[7] On August 25, 1992, the Ninth Circuit denied San Francisco's petition for rehearing and suggestion for rehearing *en banc*. On August 30, 1992, the Ninth Circuit denied San Francisco's motion for a stay of the mandate pending our petition to this Court for a writ of certiorari. *See* F.R.A.P. 41(b). On August 31, 1992, the Hon. Sandra Day O'Connor, Circuit Justice for the Ninth Circuit, denied San Francisco's

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[6] First, the district court deleted a provision in its Order imposing for the first time limits on the population in non-housing areas of Jail No. 1. The consent decree applies only to housing areas. Second, the court amended a provision in the remedial portion of the Order. Under the original provision, any fines collected after January 1, 1992 would be placed in a fund controlled by San Francisco's sheriff, the fund to be used on programs to reduce the jail population. As amended, use of that fund would be determined by San Francisco's city government, not exclusively its sheriff.

[7] On July 9, 1992, and August 25, 1992, the panel amended its decision in respects not relevant here.

application for a stay pending the city's petition for certiorari and this Court's decision on it.

B. Factual Background

In moving to hold San Francisco in contempt on May 27, 1991, the inmates acknowledged that for approximately two years since March 1989, the city had remained in compliance with the population limits at Jail No. 1. The inmates stated, however, that beginning on April 1, 1991, something "dramatically changed."

What changed on April 1, 1991 was not the vigor of San Francisco's efforts over the previous two years to comply with the district court's orders. San Francisco operates some of the most expansive programs in California to release arrested individuals. Through 1991, one of the most difficult budgetary years in San Francisco's history, the city continued every one of these programs and broadened others.

What did change on April 1, 1991 was the formal inauguration of the San Francisco Police Department's Tenderloin Task Force.[8] The Task Force represented the city's response to an outcry from citizens in the highest crime sector of San Francisco. The Task Force consisted of street officers who were transferred from other districts in the city.

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[8] A series of special police operations in the Tenderloin area of San Francisco had actually begun in February 1991. This smaller scale effort coincided with the sporadic crowding of Jail No. 1 which began in that month after two years of compliance.

The result was a 58% increase in arrests in the Tenderloin area. Because the officers transferred to the Tenderloin Task Force were no longer working in other parts of San Francisco, the 58% increase in arrests in the Tenderloin translated into only a modest increase in jail bookings city-wide between April and June 1991. Anticipating only such a modest increase, government officials did not expect a significant rise in the jail population, particularly because the Task Force was beginning at the time of the year when the inmate population traditionally starts to drop.

A rise in the jail population occurred, however, for reasons recognized by the Special Master. Most of the arrests from the Tenderloin Task Force "were for offenses that prohibited bail, citation or early release." The record shows that a greater number of individuals with prior criminal histories, including parolees from state prison, live in the Tenderloin area. Significantly, in April 1991, arrests of those parolees jumped 58% over the previous month and 85% over the previous year. Those arrested parolees may not be released.

Once San Francisco officials realized that changes in law enforcement policies were having a significant effect on the jail population, the city responded. Although facing a huge budget shortfall, in May 1991 the Mayor's office began working on a $500,000 budget reserve to ease the unanticipated jail crowding.

Advised of the overcrowding problem, and aware of the district court's concern, San Francisco's Board of Supervisors appropriated this $500,000, even though bitter political battles had just been fought over lesser sums

needed to keep open health clinics and to provide other important public services. This $500,000 reserve was in addition to another $500,000 that had earlier been added to the sheriff's budget to further the goals of the consent decree.

San Francisco used the $500,000 reserve to add and save an estimated 105 jail beds by taking the following steps: (1) hiring additional deputy sheriffs to staff the new facility at San Bruno (*i.e.*, County Jail No. 7), so that its inmate capacity could be safely increased from 300 to 360 or 370 inmates; (2) adding additional deputy sheriffs to the county parole program, saving an estimated 25 beds; and (3) contracting with a private provider for 10 additional work furlough beds, beginning in January 1992.

Unfortunately, this plan proved insufficient to accommodate the rising jail population in the last quarter of 1991. Jail bookings increased 9% in October and 7.5% in November 1991, compared with the previous year. Meanwhile, the San Francisco Municipal Court's releases of pretrial detainees on their own recognizance ("OR releases") were dropping 11% from the previous year. This decline was a function of the increasing numbers of violent crimes being prosecuted, and occurred despite the city's efforts to enlist the Municipal Court's assistance in helping to reduce the jail population.[9]

In the last part of 1991, as it became clear that San Francisco's 105-bed plan would not suffice, the city's

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[9] San Francisco officials do not, of course, control the Municipal Court's exercise of discretion.

Sheriff learned of available jail space in another county. Fraught with serious logistical and other problems, this alternative required the approval of San Francisco's Board of Supervisors and the city's newly elected Mayor. Before the new Mayor took office, however, the district court held San Francisco in contempt, ordered immediate compliance and imposed fines beginning January 2, 1992.

REASONS FOR GRANTING THE WRIT

A. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT AMONG THE CIRCUITS AND ESTABLISH THE PROPER STANDARD FOR HOLDING A GOVERNMENT DEFENDANT IN CONTEMPT FOR VIOLATING A CONSENT DECREE GOVERNING CONDITIONS OF CONFINEMENT.

The consent decree in this case sets forth the following standard for measuring San Francisco's compliance: "Good faith efforts to comply with the provisions of this Decree are the standard of compliance, except where the law provides a higher standard."

In holding San Francisco in contempt on December 17, 1991, the district court made no finding as to whether the city acted in good faith.[10] Implicitly, the district court

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[10] In setting forth the history of the proceedings, the Order recites the district court's recognition, at a February 25, 1987 hearing, that "the major issue, right at the outset, is whether the defendants are acting in good faith. . . . " *See* Appx. B, p. B-4. At that hearing, the district court suggested that San Francisco was not. *Ibid.* Ultimately, however, the city's conduct evidently led

concluded that the law does provide "a higher standard" for compliance; namely, that a party must "take every reasonable step to comply" with prior court orders. *See* Appx. B, p. B-13, *citing, e.g., General Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1379 (9th Cir. 1986); and *Balla v. Idaho State Bd. of Corrections*, 869 F.2d 461, 466 (9th Cir. 1989). The Ninth Circuit agreed, applying the "every reasonable step" test. *See* Appx. A, p. A-12.

At least three other circuits, however, do not require that "every reasonable step" be taken, but only that the defendants have acted with energy and reasonable diligence: "[P]arties may be held in civil contempt . . . if . . . they have not been reasonably diligent and energetic in attempting to accomplish what was ordered." *U.S. v. O'Rourke*, 943 F.2d 180, 189 (2nd Cir. 1991); *Newman v. Graddick*, 740 F.2d 1513, 1525 (11th Cir. 1984) ("But a person who attempts with reasonable diligence to comply with a court order should not be held in contempt"); *accord, Stotler & Co. v. Able*, 870 F.2d 1158 (7th Cir. 1989). As discussed below, the "reasonable diligence" standard is a sound and less rigid one than the test employed by the Ninth Circuit.

In light of two recent cases of this Court, San Francisco respectfully seeks certiorari to determine whether

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the district court to change this view, because the court denied the contempt motion which had been under consideration at the February 25, 1987 hearing. At the July 31, 1992 hearing on the contempt motion at issue here, counsel for the inmates candidly stated that he has "no doubt regarding good faith in this situation."

the standard used in other Courts of Appeals ought to apply in all circuits, at least in prison reform litigation. *See Wilson v. Seiter,* 111 S.Ct. 2321 (1991); *Rufo v. Inmates of Suffolk County Jail,* 112 S.Ct. 748 (1992).

In *Wilson,* the Court held that in prison cases involving allegations of unconstitutional conditions, a culpable state of mind on the part of prison officials must be proven in order to establish violations of the Eighth Amendment. 111 S.Ct. at 2324. The Court rejected a claim, supported by decisions in some circuits, that no proof of subjective culpability was necessary to establish an Eighth Amendment violation. Thus, the Court declined to add to the burden on government officials charged with the difficult task of operating jails and prisons.

In *Rufo,* the Court took another step in the same direction. In considering the proper standard to apply to modifications of jail consent decrees, the Court rejected the rigid standard in private consent judgment cases. The Court reasoned that institutional reform litigation reaches beyond the private parties and impacts broadly on the public interest. 112 S.Ct. at 758-759. Accordingly, the Court relaxed the government's burden of proof when seeking to modify obligations imposed by jail consent decrees.

Wilson and *Rufo* teach that this Court prefers flexible rather than rigid standards when considering challenges to conditions in jail and prison facilities, and that the Constitution affords government wider latitude in operating such facilities than some Courts of Appeals had previously believed. In light of that message, San Francisco respectfully seeks a writ of certiorari to allow this

Court to mandate a "reasonable diligence" standard in contempt cases involving prison conditions, rather than the "every reasonable step" test the Ninth Circuit currently applies.

The two tests differ significantly. A "reasonable diligence" standard calls for a court in a jail case to look at the totality of the defendant's efforts to comply with population limits. Thus, a government defendant who takes nine out of ten reasonable steps might have been *reasonably* diligent, but would not have been *perfectly* diligent; that is, the defendant would not have taken "*every* reasonable step." Good advocates like those in this case will always be able to come up with one more "reasonable step" that government official should have taken.[11]

Moreover, because "every dollar spent for one purpose is a dollar that cannot be spent for something else," *Rufo* at 766 (O'Connor, J., conc.), as a practical matter, a government's commitment to some steps will ordinarily preclude others. For example, a decision to build more jail beds, as San Francisco is doing here, means that less money is available for other purposes. A "reasonable diligence" test accommodates this reality and calls on the district court to review the totality of the government's

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[11] *Cf. Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 188-89 (1979). There, in expressing reservations about the "least restrictive alternative" prong of the "strict scrutiny" test, Justice Blackman wrote: "A judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down."

efforts to comply, so long as the government has acted in good faith.

The Ninth Circuit decision in this case does not directly address San Francisco's claim that "reasonable diligence" should replace the "every reasonable step" test for contempt. Instead, the decision attempts to avoid the rigidity of the "every reasonable step" test by stating that the test does not require a defendant to consider every option that a court can conceive. Quoting *General Signal Corp. v. Donallco*, 787 F.2d 1376, 1379 (9th Cir. 1986), the panel emphasizes that "technical or inadvertent violations . . . will not support a finding of civil contempt." Appx. A, p. A-14.

This analysis, however, confuses two separate and distinct defenses to contempt. The first defense is substantial compliance; if a violation is trivial, there is no contempt. *National Advertising Co. v. City of Orange*, 861 F.2d 246, 250 (9th Cir. 1988). The second defense is the one at issue here: Even where violations are nontrivial, defendants may raise the defense of diligence. The issue is whether the defendants must show they were perfectly diligent – that is, they took "*every* reasonable step" – or just reasonably diligent in light of all the circumstances. As a more flexible standard, the "reasonable diligence" test follows the teachings of *Wilson* and *Rufo*.

Carrying the Ninth Circuit's analysis one step farther, the inmates cite passing language in *Langton v. Johnston*, 928 F.2d 1206, 1220 (1st Cir. 1991), for the proposition that a defense of reasonable diligence is only available where violations are minor or technical. But neither *Langton* nor any other case so holds. Moreover,

decisions in circuits applying the "reasonable diligence" test make clear that courts determine whether a defendant has been reasonably diligent even where the violation is extreme. *See, e.g., Securities and Exchange Commission v. Porto,* 739 F.Supp. 1236 (N.D.Ill. 1990) (where defendant had paid nothing on $150,000 consent judgment, court went on to examine whether defendant's efforts were reasonably diligent); *New York State National Organization for Women v. Terry,* 697 F.Supp. 1324, 1332 (S.D.N.Y. 1988) (where abortion protestors violated injunction prohibiting blocking of clinic, court went on to examine whether leader acted with reasonable diligence by communicating terms of injunction to protestors).

Attempting to minimize the conflict among the circuits, the inmates have asserted that in *Langton v. Johnston,* 928 F.2d at 1222, the court actually used the "reasonable diligence" and "every reasonable step" tests interchangeably. But the inmates misread *Langton.* There, the court equated "reasonable diligence" with taking "reasonable steps," but not with taking "every reasonable step." Obviously, to be reasonably diligent, one must take *some* "reasonable steps." One need not, however, take "*every* reasonable step."

Under a "reasonable diligence" approach, San Francisco would not have been found in contempt on the record in this case. Perhaps the strongest evidence of San Francisco's diligence has been the city's tremendous commitment of resources. This commitment goes beyond the $30-plus million San Francisco has spent in furtherance of the decree. The city's Mayor and Board of Supervisors have chosen to fulfill their obligations under the consent decree while declining to appropriate smaller sums for

equally important public programs that have far greater political appeal. Public health clinics, AIDS relief, substance abuse programs, and assistance for indigent senior citizens living at home are only some examples of programs the record shows were denied funding while jail spending increased.

The additional funds San Francisco spent on the jails in the difficult 1991 budget year allowed the city to continue and expand its programs to reduce the jail population. To speed the processing and release of inmates, San Francisco hired a night-time district attorney, expedited probation reports, worked with the San Francisco Superior Court to expedite trials, worked with the San Francisco Municipal Court to increase the number of pretrial detainees released on their own recognizance, improved its police reports, and upgraded its county parole program. Further, San Francisco has completed one new jail and is in the process of building another.

In addition, while facing a huge budget shortfall, San Francisco added deputy sheriffs to its payroll to allow for expanded capacity in existing facilities, and contracted with a private provider for additional work furlough beds. And when all of these methods proved insufficient, city officials began to explore the expensive and logistically difficult option of renting jail beds in other counties. (Ultimately, the city has implemented that option, renting more than 200 jail beds in neighboring Alameda County).[12] Under a test of "reasonable diligence," San

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[12] At a December 30, 1991 hearing on San Francisco's motion for a stay, the district court suggested that the city could

Francisco would not have been found in contempt. The Court should grant certiorari to consider whether it is now time to adopt such a test.

B. THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER A DISTRICT COURT SHOULD CONSIDER THE FINANCIAL CONSTRAINTS UPON A GOVERNMENT DEFENDANT IN MEASURING THE REASONABLENESS OF THE GOVERNMENT'S EFFORTS TO COMPLY WITH A CONSENT DECREE GOVERNING CONDITIONS OF CONFINEMENT.

At various points during the course of the proceedings in this case, San Francisco emphasized to the district court that the city's ability to comply was limited by its fiscal constraints. As the record shows, San Francisco had increased its spending on consent decree issues at a time of extreme financial distress. At every point where San Francisco raised these concerns, however, it was greeted with the same response from the district court:

> How many times is it necessary to reiterate a very fundamental principle of constitutional law, namely, that lack of funds for any facility

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have contracted for *more* private work furlough beds and moved *sooner* to rent jail beds in Alameda County. The record shows that because state courts have restricted the use of alternative programs, the city's Sheriff was prevented from making greater use of such alternatives. The record also shows that the Sheriff began developing the plan to rent jail beds in Alameda County as soon as he discovered those beds were available.

> does not justify the maintenance of unconstitutional conditions? It is almost at every hearing I have to pay attention to that.

Transcript of December 30, 1991 hearing.

A few days after the hearing, however, this Court made clear that this principle is not unqualified. In *Rufo v. Inmates of Suffolk County Jail,* the Court adopted "a flexible standard" for modifying consent decrees in cases involving conditions of confinement. In so doing, the Court recognized that while "[f]inancial constraints may not be used to justify the creation or perpetuation of constitutional violations, . . . *they are a legitimate concern of government defendants in institutional reform litigation.* . . . " 112 S.Ct. at 764 (emphasis added). The Court criticized the district court in *Rufo* for treating such concerns as only "marginal." *Ibid.*

The Ninth Circuit concluded that *Rufo* has no application to this case because the language quoted above was offered in the context of modifying the terms of a consent decree. Appx. A, p. A-17, n.14. Thus, the Ninth Circuit concluded that *Rufo* does not change federal law "that financial constraints do not allow states to deprive persons of their constitutional rights." *Id.* at A-17.

However well established this proposition may be in other contexts, it has no bearing here. The district court in this case made no finding of any constitutional violation, and in fact, expressly disavowed such a finding. The consent decree itself specifically states that "defendants do not admit to any . . . violations of constitutional standards." Appx. A, p. A-25, n.20.

Thus, the question here is whether this Court's direction in the *Rufo* context that district courts take into account the fiscal constraints on local governments should also apply in the context of contempt proceedings in consent decree cases. Plainly, in a period of diminishing local resources, one important factor in determining the reasonableness of a local government's efforts to comply with a consent decree is the revenues available to the local entity.

The effect of limiting consideration of fiscal constraints to situations where a modification is sought would be to force local entities suffering from fiscal distress to seek modifications where they might otherwise not do so. In other words, while temporarily unable to comply due to financial limitations and other factors, a local government may not wish to alter permanently its obligations under a consent decree; if, however, the only way to obtain consideration of its fiscal plight is to do so, that is exactly what the government will be forced to do. This Court should grant certiorari to consider the important question of whether in the contempt context, fiscal realities are material in measuring the reasonable efforts of a local government to comply with a consent decree in institutional reform litigation.

C. THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER, IN THE CONTEXT OF CONTEMPT PROCEEDINGS IN A CASE INVOLVING A CONSENT DECREE GOVERNING CONDITIONS OF CONFINEMENT, THE DEFENDANT MUST PROVE THAT THE CAUSE OF THE VIOLATION WAS UNFORESEEABLE.

In *Rufo*, this Court rejected the contention that in institutional reform litigation, a government defendant

seeking to modify the terms of a consent decree based upon changed circumstances must show that the change in circumstances was both unforeseen and unforeseeable. 112 S.Ct. at 760. Rather, the Court held that the changed circumstances need only have been unforeseen. The Court reasoned that "[l]itigants are not required to anticipate every exigency that could conceivably arise during the life of a consent decree." *Ibid.*

The same standard should apply in adjudging whether to hold in contempt a government defendant that has violated a consent decree. Nine or ten years after a decree is executed, circumstances causing a violation may occur, as happened in this case. If a defendant did not foresee those circumstances, and the defendant has made reasonable efforts to comply, the defendant should not be held in contempt, even if those circumstances were theoretically foreseeable. Otherwise, to avoid contempt, a defendant who is out of compliance will have no choice but to seek modification of the decree, regardless of whether the defendant believes that modification is necessary or appropriate.

In this case, the Ninth Circuit held that "the district court did not clearly err in finding that the jail population increases were foreseeable. . . . " Appx. A, pp. A-15-16.[13]

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[13] In support of this conclusion, the Ninth Circuit pointed to predictions of the inmate population for 1991 by the Special Master and an outside consultant. Yet the record shows that these predictions were too high for the previous two years; accordingly, San Francisco officials were understandably surprised when the jail population increased so dramatically in 1991.

In fact, however, the district court made no such finding.[14] Nor did the district court find that the rise in the jail population was foreseen.

The record here demonstrates two reasons why the rising jail population was unforeseen. First, the city began the law enforcement campaign responsible for the rising jail population at the time of the year when the jail population traditionally falls. Second, San Francisco's police department organized the campaign by transferring officers from other parts of the city, not by adding new officers to the force. Accordingly, San Francisco officials reasonably expected that increased arrests in the Tenderloin would be counterbalanced by decreasing arrests elsewhere.

In fact, the record shows that this is precisely what happened. While arrests in the Tenderloin increased dramatically, arrests city-wide rose only marginally. What accounted for the growing jail population was a fact San

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[14] In addition to asserting that the district court made findings which it did not make, the Ninth Circuit also erred in holding that San Francisco had waived its objections to various findings the district court did make. The Ninth Circuit ruled that San Francisco had not objected to their findings when they were made by the Special Master. In fact, most of the findings had never been made by the Special Master. San Francisco challenged the factual findings on the ground that they did not support the district court's legal conclusion that the city had not taken all reasonable steps to comply. Although the district court's errors regarding the factual finding are not the subject of this petition, should the Court be interested in San Francisco's challenge to the district court's factual findings, we refer the Court to pages 27-37 of the City's Opening Brief in the Ninth Circuit, reprinted as Appendix C to this Petition.

Francisco officials had not anticipated: Arrests in the Tenderloin included larger percentages of parolees and criminals with prior histories who were not eligible for pretrial release.[15] Because defendants' violations resulted from this unforeseen fact, San Francisco should not have been held in contempt.

In sum, this Court should grant certiorari to determine whether in a contempt proceeding arising from a violation of a consent decree governing conditions of confinement, the defendant must show that the circumstances giving rise to the violation were unforeseeable, or whether the defendant need only show that the circumstances were unforeseen.

D. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER A FEDERAL COURT SEEKING TO ASSURE COMPLIANCE WITH A CONSENT DECREE MAY AUTHORIZE, OVER OBJECTION, THE EARLY RELEASE OF INMATES SENTENCED BY A STATE COURT.

San Francisco's District Attorney urges that certiorari be granted on a separate ground. Although the Ninth

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[15] In the month after the Tenderloin operation began, when it became clear that the policy change had affected the jail's population, San Francisco began moving to increase the resources for its correctional facilities. Six months later, when it became apparent that even these resources would not suffice, the city began exploring the possibility of using jail space in other counties. This process was ongoing when the contempt finding occurred.

Circuit has vacated the provision of the Order authorizing 50% releases, the District Attorney challenges the Court's reliance on *Plyler v. Evatt*, 924 F.2d 1321, 1329 (4th Cir. 1991), for the proposition that in the future the district court may consider such releases if monetary sanctions fail to produce compliance. The District Attorney points out that the *Plyler* court's suggestion was dicta since the issue of release was not before the court. He also emphasizes that the *Plyler* court did not discuss issues of federalism or public safety in connection with its statement about early releases. In addition, the District Attorney notes the *Plyler* court limited any consideration of early releases to situations involving a showing of "newly arisen bad faith on the state's part." 924 F.2d at 1329. Finally, the District Attorney notes that the panel decision includes no citation to the federal cases reversing orders providing for the early release of inmates. *See, e.g., Duran v. Elrod*, 760 F.2d 756, 762-63 (7th Cir. 1985). As counsel for the entire city, we wish to bring these arguments to the Court's attention.

CONCLUSION

For the reasons set forth above, this Petition for Certiorari should be granted.

DATED: November 20, 1992

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILL STONE; HENRY WASHINGTON; ALBERT MATIAS; FREDDY TOOKS; JO ANN SPARKS, on behalf of themselves and all other similarly situated, *Plaintiffs-Appellees,* v. CITY AND COUNTY OF SAN FRANCISCO; MICHAEL HENNESSEY, SHERIFF, Mayor of the City and County of San Francisco; Department of Public Health of the City and County of San Francisco, *Defendants-Appellants.*	No. 91-16927 D.C. No. CV-78-02774-WHO OPINION

Appeal from the United States District Court
for the Northern District of California
William H. Orrick, District Judge, Presiding

Argued March 10, 1992
Submitted April 17, 1992
San Francisco, California

Filed June 25, 1992
Amended August 25, 1992

Before: Herbert Y.C. Choy, Jerome Farris, and Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Choy

OPINION

CHOY, Circuit Judge:

The City and County of San Francisco ("the City") appeals a contempt order against it for its failure to comply with provisions of a consent decree governing population levels at one of the City's jails. We affirm the entry of the contempt order, but vacate that part of the order allowing the Sheriff to override applicable state laws in conducting early release.

I. FACTUAL AND PROCEDURAL BACKGROUND

The plaintiffs are pretrial detainees in San Francisco's jail on the sixth floor of the Hall of Justice ("Jail No. 1"). The plaintiffs filed a class action in 1978 challenging the conditions of their confinement. The primary objectionable condition was the population level at Jail No. 1.

On July 15, 1982, the parties agreed to a consent decree, which the district court entered. The consent decree included a provision that the jail's housing areas should not regularly house more inmates than the capacity set by the California Board of Corrections.[1]

In June 1985, the plaintiffs moved to hold the City in contempt for violating provisions of the decree, including the provision concerning mandated population levels. In May 1986, the district court ordered the City to comply with the decree's provisions and appointed a Special

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[1] The parties also negotiated a number of other conditions for the jail's operation not relevant to this appeal.

Master to investigate, report, and recommend actions the City should take to ensure compliance. As a result of continued noncompliance by the City, the Special Master recommended in March 1987 that the district court impose sanctions when the jail exceeded its population capacity.

The district court held a hearing in April 1987 on the plaintiffs' contempt motion, but continued the matter until June to give the City an opportunity to present a plan to address the overcrowding problem. In August 1987, the City agreed that if it failed to achieve either the overall capacity level for the entire jail or the individual capacity levels for housing units, the district court could impose monetary sanctions. The City further agreed that the court could grant special powers to the Sheriff to cope with the overcrowding problem, including the power to conduct citation release of inmates and the power to release certain inmates before they had served their entire sentences.[2]

After a prolonged period of compliance, Jail No. 1 became overcrowded again. On November 28, 1987 the district court issued an order to show cause why the City

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[2] The court's order authorized the Sheriff to "release by citation all misdemeanants, whose arrest record does not include arrest for crimes involving the use of a dangerous weapon and who have a California identification or substitute identification. . . . " *Stone v. City & County of San Francisco,* No. C-78-2774 (N.D. Cal. Jan 14, 1988) (order modifying Amended Order). If the use of that power proved ineffective, the Sheriff was also authorized to release misdemeanants who had served 90% of their sentences. *Id.* This order did not authorize the Sheriff to disregard any applicable state laws.

should not be held in contempt. The court held the motion under submission while the City worked to complete a new jail facility in San Bruno ("Jail No. 7"). At a hearing in January 1988, the district court found that the City had made "substantial progress" towards compliance but that Jail No. 1 remained overcrowded. The court gave the City further powers to control the inmate population by allowing the Sheriff to release "all sentenced prisoners within San Francisco County Jail system who have served 90%, 80%, and 70% of their sentences" as necessary to reach the population limits. Moreover, the court expanded the Sheriff's powers by allowing him to release inmates even when such release contravened applicable state laws.

Despite the Sheriff's liberal use of these powers, overcrowding persisted. The district court held hearings in April, July, and October of 1988 on the pending motion for contempt, but each time it continued the hearing to allow the City the opportunity to meet the population limits. Finally, at a status conference the court ordered the imposition of fines of $300 per inmate per day if the City failed to comply by March 15, 1989.

The City complied by the deadline by shifting inmates to other jails, by making use of Jail No. 7, and by relying on the Sheriff's early-release powers. On June 19, 1989, the court extended the consent decree beyond its seven-year term and denied the pending contempt motion.

The City remained in compliance with the population limits for almost two years until February 19, 1991. After that date the total jail capacity was exceeded on

numerous occasions, and the plaintiffs filed a contempt motion on May 30, 1991. At a hearing on July 31, 1991, the district court found that the City had violated the population limits at Jail No. 1. The City requested time to prepare a plan to alleviate the overcrowding problem and to obtain funds to implement the plan. The court postponed a second hearing in September to allow the city further time to prepare. The City submitted its plan to the court on October 7, 1991. Jail No. 1 was chronically overcrowded during the intervening period. At the November hearing, the City requested more time to implement its plan to cope with a recent surge in the jail population. The court took the matter under submission.

On December 17, 1991, the district court found the City in contempt because it had not taken "all reasonable steps" to comply with the population limits. The court ordered that the City immediately comply with the consent decree and imposed sanctions of $300 per day per inmate for each day after January 1, 1992 that the City violated the order. The court expanded the Sheriff's powers to reduce population levels by allowing him to release prisoners who had served 60% and then 50% of time served.[3]

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[3] The court added, "[T]he Sheriff shall not be bound by state laws which restrict participation of inmates in work furlough programs (Cal. Penal Code § 1208), work in lieu of incarceration programs (Cal Penal Code § 4024.2), electronic home detention programs (Cal. Penal Code § 1203.016), or county parole placement programs (Cal. Penal Code § 3076)." *Stone v. City & County of San Francisco*, No. C-78-2774 (N.D. Cal. Dec. 17, 1991) (Memorandum Opinion and Order finding City in contempt). The court modified the order the next day to clarify that

On December 26, 1991, the City filed a motion to stay the order or, in the alternative, reconsider the court's opinion. The court denied both requests on December 30th, but modified the order by requiring that the fines be placed in fund to be controlled and administered by the City and used for programs to reduce Jail No. 1's population levels. On December 31st, this court temporarily stayed the district court's order pending appeal.

After the parties filed their briefs, we granted the District Attorney for the City leave to file an *amicus* brief. The District Attorney's brief urged us to invalidate portions of the district court's order because it violated principles of federalism. In particular the *amicus* was concerned about those portions of the court's orders that allowed the Sheriff to override applicable state laws and state court criminal sentences ordered pursuant to those laws. Because these issues also troubled the panel, we ordered supplemental briefing by the parties.

II. DISCUSSION

A. Jurisdiction

As a general rule, contempt orders against a party to pending proceeding are not considered final under 28 U.S.C. § 1291. *United States v. Westinghouse Elec. Corp.*, 648 F.2d 642, 651 (9th Cir. 1981); *Hughes v. Sharp*, 476 F.2d 975 (9th Cir. 1973).

Where the contempt order is a *post-judgment* order imposing *sanctions*, however, the order may be final for

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the Sheriff was authorized to release both felons and misdemeanants.

the purposes of § 1291. *Weyerhaeuser Co. v. International Longshoremen's & Warehousemen's Union, Local 21*, 733 F.2d 645 (9th Cir. 1984). A consent decree is considered a final judgment despite the fact that the district court retains jurisdiction over the case. *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 674 F.2d 976, 981 (3d Cir.), *cert. denied*, 459 U.S. 905 (1982); *cf. United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1426 (10th Cir. 1990) (order entered three years after consent judgment appealable because underlying controversy was concluded), *cert. denied*, 111 S. Ct. 799 (1991). Thus, the contempt order in this case is a post-judgment order because the parties agreed to the consent decree in 1982.

A post-judgment order imposing sanctions acquires the "operativeness and consequence" required for finality under § 1291. *Shuffler v. Heritage Bank*, 720 F.2d 1141, 1145 (9th Cir. 1983).[4] The plaintiffs claim that the district court's contempt order is not final because (1) sanctions will not be levied until the City violates the population limits, and (2) the Special Master failed to determine that a bona fide emergency beyond the control of the City exists.[5]

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[4] When a contempt order threatens to impose sanctions to coerce compliance but the sanctions never actually are imposed because the party appeals before the sanctions accrue, the order is not final. *See Petroleos Mexicanos v. Crawford Enters.*, 826 F.2d 392, 399 (5th Cir. 1987); *see also Donovan v. Mazzola (Donovan I)*, 761 F.2d 1411, 1416-17 (9th Cir. 1985). This rule is inapplicable here because the fines would have begun accruing on January 1, 1992. The only reason the fines have not been levied is this court's temporary stay.

[5] The consent decree provides that the Special Master can excuse noncompliance with the population limits if he determines that a bona fide emergency exists.

In this case, the sanctions are not speculative. The City has not been required to pay sanctions because of this court's stay of the district court's order.[6] The record demonstrates that the City is not in compliance with the population limits and thus would be required to pay the fines if the stay were not in effect. Hennessey Decl. in Support of Mot. for Stay ¶ 8 (Jan. 6, 1992). The fact that the exact amount of the fines is undetermined and ongoing does not make the sanctions speculative. *See Shuffler*, 720 F.2d at 1145; 9 James Wm. Moore et al., *Federal Practice* § 110.13[4], at 150 (2d ed. 1992) ("if the contempt judgment is entered in a post-final judgment proceeding, it is final and appealable, since there is no other judgment from which the appeal will lie"). Nor does the fact that the sanctions are conditional defeat the contempt order's finality. *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 777 (9th Cir. 1983) (sanctions paid but could be refunded with subsequent compliance). This situation is distinct from cases where the contempt order was not final because certain *compensatory* contempt sanctions had

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[6] *Weyerhaeuser Co.*, 733 F.2d at 645 and *Hoffman v. Beer Drivers & Salesmen's Local Union No. 888*, 536 F.2d 1268 (9th Cir. 1976), both holding that speculative sanctions bar finality, are distinguishable. In *Hoffman*, the court held it did not have jurisdiction over an order that assessed fines but suspended them on the condition that they be purged. *Id.* at 1272. The district court's order in this case made no such condition. In *Weyerhaeuser*, the court dismissed the appeal because "further proceedings remain[ed] in the district court." *Weyerhaeuser Co.*, 733 F.2d at 646. Thus the order came within the general rule barring appeal of contempt orders when other proceedings are pending.

not yet been determined. *See American St. Gobain Corp. v. Armstrong Glass Co.*, 418 F.2d 571 (6th Cir. 1969).

As to the argument that the Special Master could excuse noncompliance, there is no evidence that the City would be excused for noncompliance. As the City points out, the emergency clause was meant to cover situations such as mass demonstrations, civil disobedience, or other events causing a large but temporary surge in the jail's population. Moreover, the City has made no effort to invoke this provision and nothing would require them to do so in order to make the district court's contempt order final for the purposes of § 1291.

Finally, pragmatic concerns cut in favor of finding the contempt order to be final. The Supreme Court has counseled a practical rather than a technical interpretation of § 1291. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-53 (1964). The most important concerns in determining § 1291 finality are "the inconvenience of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950). Allowing an appeal of Judge Orrick's order does not encourage piecemeal litigation. The consent decree is the equivalent of a final judgment; thus ongoing proceedings would not be disrupted by allowing an appeal of the contempt order. Moreover, treating the order as final avoids the danger of unjust delay.

Requiring the City to accrue large sums in sanctions before appealing the order, as the plaintiffs argue, belies common sense. The plaintiffs' rule would require the City

to violate the order, pay the fines into the fund, and then comply with the decree's population limits to make the amount of fines certain before the City could appeal the contempt order. Under these circumstances, "both policy and common sense would dictate that we assume jurisdiction under the rule of *Gillespie*. . . . " *Smith v. Eggar*, 655 F.2d 181, 184-85 (9th Cir. 1981). Such a result comports with the realities of prison reform litigation: "[I]nstitutional reform litigation frequently requires that jurisdiction be retained long after the basic determination of liability. Just as appeal should be available from successive remedial orders, so should appeal be available from a finding of contempt when circumstances make it uncertain whether any further orders will be required." 15B Charles A. Wright et al., *Federal Practice and Procedure: Jurisdiction 2d* § 3917, at 397 (1992). This argument is especially persuasive where the contemnor is under the threat of continuing contempt as in this case.[7]

Although the issue was not raised by the parties, we also have jurisdiction to consider the federalism questions raised by the *amicus*. Issues touching on federalism and comity may be considered *sua sponte*.[8] In habeas corpus cases, for example, federal courts may consider *sua sponte* whether the defendant has exhausted state

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[7] Because the order is final for purposes of § 1291, it is unnecessary to reach the City's claim under § 1292(a)(1).

[8] Comity issues do not, however, present a jurisdictional bar. Thus the court does not have a duty, as it does with subject-matter jurisdiction, to consider such issues if not raised by the parties. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 n.8 (1987) (exhaustion is comity principle, not a "jurisdictional prerequisite"); *see also Naranjo v. Ricketts*, 696 F.2d 83, 86 (10th Cir. 1982).

remedies, a question touching upon delicate issues of federalism. *See Granberry v. Greer*, 481 U.S. 129, 134 (1987) (when state fails to raise nonexhaustion claim, "court should determine whether the interests of comity and federalism will be better served by addressing the merits forthwith or by requiring" further state proceedings); *see also Taylor v. Gilmore*, 954 F.2d 441 (7th Cir. 1992) (applying *sua sponte* rule that federal courts will not correct errors of state criminal law in collateral proceedings), *petition for cert. filed*, 60 U.S.L.W. 3783 (U.S. Apr. 27, 1992) (No. 91-1738); *Fortino v. Quasar Co.*, 950 F.2d 389, 391 (7th Cir. 1991) ("[c]omity . . . accepted reason for an appellate court to consider issues that would otherwise have been deemed waived . . . "); *Smith v. Moffett*, 947 F.2d 442, 445 (10th Cir. 1991) (court of appeals has discretion to raise comity issues *sua sponte*); *Thomas v. Indiana*, 910 F.2d 1413, 1415 (7th Cir. 1990) ("delicate questions of comity can be raised on the court's own initiative"). The underlying principle in these cases logically extends to institutional reform litigation, especially where acts of the state legislature and judiciary are involved.

B. The Contempt Order

The district court has "wide latitude in determining whether there has been a contemptuous defense of its order." *Gifford v. Heckler*, 741 F.2d 263, 266 (9th Cir. 1984); *see Spallone v. United States*, 493 U.S. 265, 276 (1990) (federal courts have inherent power to enforce their lawful orders through contempt). This court reviews a district court's contempt finding and imposition of sanctions for abuse of discretion. *Diamontiney v. Borg*, 918 F.2d 793, 795 (9th Cir. 1990); *In re Grand Jury Proceedings*, 914 F.2d 1372,

1373 (9th Cir. 1990). Moreover, deference to the district court's exercise of discretion is heightened where the court has been overseeing a large, public institution for a long period of time. *Rufo v. Inmates of Suffolk County Jail,* 112 S. Ct. 748, 765 (1992) (O'Connor, J., concurring); *see also Hutto v. Finney,* 437 U.S. 678, 688 (1978) (substantial deference given to district court's "years of experience with the problem at hand"). Such deference applies in this case because Judge Orrick has been involved with this case since 1978 and has overseen the implementation of the consent decree for nearly a decade.

This Circuit's rule with regard to contempt has long been whether the defendants have performed "all reasonable steps within their power to insure compliance" with the court's orders. *Sekaquaptewa v. MacDonald,* 544 F.2d 396, 404 (9th Cir. 1976), *cert. denied,* 430 U.S. 931 (1977); *see also General Signal Corp. v. Donallco, Inc.,* 787 F.2d 1376, 1379 (9th Cir. 1986).[9]

The City argues that its good faith efforts to comply with the provisions of the consent decree should excuse its noncompliance. The City, however, confuses the liability standards for Eighth and Fourteenth Amendment

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[9] The moving party has the burden of showing by clear and convincing evidence that the contemnors violated a specific and definite order of the court. *Balla v. Idaho St. Bd. of Corrections,* 869 F.2d 461, 466 (9th Cir. 1989). The burden then shifts to the contemnors to demonstrate why they were unable to comply. *Donovan v. Mazzola (Donovan II),* 716 F.2d 1226, 1240 (9th Cir. 1983), *cert. denied,* 464 U.S. 1040 (1984). They must show they took every reasonable step to comply. *Sekaquaptewa,* 544 F.2d at 406.

violations with applicable standards of review for contempt orders. Intent is irrelevant to a finding of civil contempt and, therefore, good faith is not a defense. *See McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949); *Donovan I*, 716 F.2d at 1240; *Toussaint v. McCarthy*, 597 F.Supp. 1427, 1430 (N.D. Cal. 1984); *see also Fortin v. Commissioner of Mass. Dep't of Pub. Welfare*, 692 F.2d 790, 796 (1st Cir. 1982).

Recent Supreme Court cases do not change this standard. *Wilson v. Seiter*, 111 S. Ct. 2321, 2326-27 (1991) held that plaintiffs must show prison officials showed "deliberate indifference" to prison conditions to establish an Eighth Amendment violation. This standard, however, is inapplicable here because the City has consented to improving the conditions in Jail No. 1,[10] and the City never has challenged or moved to modify the consent decree. Nor does the City argue that this appeal should be treated as a challenge to the consent decree.

In *Rufo*, 112 S.Ct. at 758, the Supreme Court established the standard to modify the terms of a consent decree based on changes in the law or facts and held that Rule 60(b) of the Federal Rules of Civil Procedure applies to such situations. The issue of what standard a court should use to determine whether a party is in contempt

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[10] Moreover, *Wilson* addressed claims by convicted prisoners, whereas the plaintiffs here are pretrial detainees who possess greater constitutional rights than prisoners. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (pretrial detainees may not be subject to "punishment"); *see also Redman v. County of San Diego*, 942 F.2d 1435, 1440 n.7 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 972 (1992).

was not before the Court.[11] These recent Supreme Court cases do not speak directly to the issue before us and therefore do not disturb long-standing Ninth Circuit law.[12]

The City mischaracterizes the "every reasonable step" rule by asserting that it must consider every option that the court could conceive. The case that established the standard, *Sekaquaptewa* 544 F.2d at 396, makes no such suggestion. The *Sekaquaptewa* court held that the contemnors had failed to take "every reasonable step" to comply because there was "little conscientious effort on the part of the appellants to comply with those orders. . . . " *Id.* at 406. More recent cases have held that "technical or inadvertent violations . . . will not support a finding of civil contempt." *General Signal Corp.*, 787 F.2d at 1379.

The district court considered two factors in determining that the City had not taken every reasonable step: (1) the City's history of noncompliance with the inmate population levels; and, (2) the failure to comply despite the pendency of the contempt motion. Over the nine years that the consent decree has been in effect, Jail No. 1's population level often has been above the prescribed limits. In fact, the jail had been overcrowded for eight

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[11] As this court has noted, "[A] contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy." *Balla*, 869 F.2d at 465 (citation omitted).

[12] Similarly, the defendants' reliance on *United States v. Michigan*, 940 F.2d 143 (6th Cir. 1991) is misplaced. That court's analysis was based on the premise that the district court had *modified* the consent decree. *Id.* at 149-51. The City has not moved to modify the consent decree in this case.

months before the district court entered the contempt order. Moreover, the City in the past had failed to comply with other provisions of the consent decree such as those covering staffing, recreation, and medical and health care. Such evidence is highly relevant in finding the City in contempt. *See Balla,* 869 F.2d at 472 (historic failure to comply relevant in fashioning remedy). The City failed to comply with the consent decree despite the district court threat to impose harsh monetary sanctions. *See Toussaint,* 597 F.Supp. at 1430 (undisputed delay of eight months in obeying order "sufficient in itself to establish that respondents . . . did not act with reasonable dispatch"). Against this background, the district court's finding that the City had not taken every reasonable step to comply with the consent decree was not an abuse of discretion.

The City argues that the recent upsurge in the jail population beginning in February was unforeseen. There is evidence, however, that the City should have known that the jail population was going to increase. The district court's factual findings are reviewed for clear error. *Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680, 689 (1946); *In re Crystal Palace Gambling Hall, Inc.,* 817 F.2d 1361, 1364 (9th Cir. 1987). In 1989, the National Council on Crime and Delinquency published its report predicting that San Francisco's jail population would reach 2109 inmates per day by 1992. This figure is very close to the actual prison population today. Moreover, the Special Master predicted the population would be 2055 inmates per day. The only rebuttal offered by the City is hearsay evidence that was not part of the record below. Under these circumstances, the district court did not clearly err

in finding that the jail population increases were foreseeable and that the City should have taken further steps to alleviate the overcrowding problem.[13]

The City challenges several of the district court's factual findings that supported its contempt order. Plaintiffs argue that the City has waived its objections to these findings by not contesting them when they were submitted by the Special Master as part of his progress reports. We agree. The Special Master's progress reports were filed in accordance with Rule 53(e)(1) of the Federal Rules of Civil Procedure. The Special Master submitted drafts of the reports to the parties so that they could correct any factual errors. The City has never objected to any of these findings and thus has waived its right to object. *See Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991); *Gonzalez v. Sullivan*, 914 F.2d 1197, 1200 (9th Cir. 1990); *Britt v. Simi Valley Unified School Dist.*, 708 F.2d 452, 454 (9th 1983).

Even if the City has not waived its objections, the court's findings are subject to a clear error test. *In re Crystal Palace Gambling Hall, Inc.*, 817 F.2d at 1364. Our

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[13] The cases cited by the City, *Nelson v. Collins*, 659 F.2d 420 (4th Cir. 1981) and *Thompson v. Enomoto*, 542 F.Supp. 768 (N.D. Cal. 1982), are inapposite. In *Nelson*, the court applied a "good faith compliance" standard used by the Fourth Circuit, *Nelson*, 659 F.2d at 422, but this is not the law of this Circuit. Moreover, the increases in the prison population were due to unforeseen circumstances. *Id. Thompson* also involved unforeseeable increases in the prison population. *Thompson*, 542 F.Supp.at 770. Moreover, the court found that a contempt finding was unnecessary since the parties were willing to modify the consent decree, a situation that does not exist here. *Id.* As discussed, the standards in such a case are different than those applicable here.

review of the district court's findings does not lead us to conclude that the court committed clear error.

The City argues that it faces a financial crisis that prevents it from funding these programs, but federal courts have repeatedly held that financial constraints do not allow states to deprive persons of their constitutional rights. *See Toussaint v. McCarthy*, 801 F.2d 1080, 1110 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987); *Lareau v. Manson*, 651 F.2d 96, 104 (2d Cir. 1981); *Smith v. Sullivan*, 611 F.2d 1039, 1043-44 (5th Cir. 1980); *Battle v. Anderson*, 564 F.2d 388, 396 (10th Cir. 1977); *Jackson v. Bishop*, 404 F.2d 571, 580 (8th Cir. 1968).[14]

Finally, the City argues that it has spent thirty million dollars on programs to cope with the overcrowding program. While this demonstrates that the City has made efforts in the past to comply with the consent decree, it does not render the court's contempt order an abuse of discretion. The City was in violation of the decree for eight months before the court entered the contempt order. On many previous occasions, the population at Jail No. 1 exceeded its limits, and the court threatened the City with sanctions in order to obtain compliance. It had

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[14] The City's reliance on *Rufo* does not change the analysis: the first portion of the language that the City cites states that "financial constraints may not be used to justify the creation or perpetration of Constitutional violations." *Rufo*, 112 S.Ct. at 764. While the Court goes on to state that financial constraints are an important interest to be considered, this is in the context of modifying the terms of a consent decree to meet unexpected or unanticipated circumstances that make compliance onerous, *id.*, a circumstance not present in this case.

become obvious that the City's plan to address the overcrowding problem was inadequate and that stronger measures were needed. It does not appear, nor does the City argue, that the sanctions themselves were too onerous as to be an abuse of discretion.

C. *Expanded Powers for the Sheriff.*

The City argued that it received inadequate notice and an opportunity to be heard before the district court gave the Sheriff the power to release inmates after they have served 50% of their sentences. The City therefore argues that this portion of the contempt order must be remanded.[15]

The added powers, however, only expanded the Sheriff's authority to comply with the consent decree. The contempt order did not alter the nature or scope of the population limits established in the consent decree. It therefore did not modify the decree because it did not change the underlying legal relationship between the parties. *See Sierra Club v. Marsh*, 907 F.2d 210, 212 (1st Cir. 1990) (preliminary injunction not modified by subsequent order); *cf. Thompson v. Enomoto*, 815 F.2d 1323, 1327 (9th Cir. 1987) (addition of special master did not modify consent decree).

Independently, the City received adequate notice of the changes. The City originally agreed to the early-

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[15] The City concedes, however, that it had notice that the court may have expanded the Sheriff's powers to allow releases at 60% of time served because this recommendation was made in the Special Master's 14th Progress Report.

release and state-law-override provisions in June 1987. The court expanded the early release provisions from 90% to 70% of time served in January 1988 without objection from the City. Moreover, the Special Master had recommended in his fourteenth progress report that the early-release provisions be expanded further. Finally, the City objected to the expansion of the early-release provisions at this hearing, and the court changed parts of the order based on these objections. Under these circumstances, the City had sufficient notice of the changes and an opportunity to be heard.

D. Federalism

The *amicus* brief raises questions about the district court's orders empowering the Sheriff to release prisoners before they have served their entire sentences. The *amicus* argues that the early-release provisions impinge on the (1) state legislature's discretion to formulate criminal laws;[16] and, (2) on the state courts' ability to enforce these laws.[17] These two concerns implicate problems regarding the appropriate limits of federal equitable powers to enforce consent decrees.[18]

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[16] In addition to those provisions listed in note 1, the early-release provisions allowed the City to circumvent California Penal Code §§ 4024.1 and 827.1.

[17] Nothing in any of the district court's orders directly authorizes the Sheriff to ignore actions of the state judiciary. The *amicus* argues that the court's override provisions impinge on state court sentences that rely on the penal code provisions that the Sheriff is authorized to disregard.

[18] The *amicus* also argues that the appointment of a special master raises federalism concerns, but this claim does not

The Supreme Court has recognized that "appropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief." *Rizzo v. Goode*, 423 U.S. 362, 379 (1976); *see also O'Shea v. Littleton*, 414 U.S. 488 (1974); *Milliken v. Bradley (Milliken I)*, 418 U.S. 717 (1974).

Article III extends the federal judicial power "to all Cases, in Law and Equity" that fall with certain categories. Equity jurisdiction "prescribes the body of doctrine which is to guide [federal courts'] decisions and enable

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deserve serious consideration. Federal courts repeatedly have approved the use of special masters to monitor compliance with court orders and consent decrees. *United States v. Michigan*, 940 F.2d at 157 (approving monitoring of state prisons while finding other portions of remedial scheme violated federalism principles); *Kendrick v. Bland*, 740 F.2d 432, 438 (6th Cir. 1984) (court may appoint monitor to oversee compliance with valid federal court order); *Hoptowit v. Ray*, 682 F.2d 1237, 1263 (9th Cir. 1982) (upholding appointment of special master to "monitor compliance" but not take control of prison); *Ruiz v. Estelle*, 679 F.2d 1115, 1161 (5th Cir. 1982), *vacated in part on other grounds*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983); *Campbell v. McGruder*, 580 F.2d 521, 544 (D.C. Cir. 1978); *Miller v. Carson*, 563 F.2d 741, 753 (5th Cir. 1977); *Newman v. Alabama*, 559 F.2d 283, 290 (5th Cir. 1977) (monitors appointed with authority to observe but not to intervene in prison affairs); *Gates v. Collier* 501 F.2d 1291 (5th Cir. 1974) (monitor appointed to ensure compliance with court orders); *Inmates of Attica Correctional Facility v. Rockefeller*, 453 F.2d 12, 25 (2d Cir. 1971) (remanded to consider appointment of federal monitor).

The special master has no authority to interfere with the operation of the City's jails. The district court appointed the Special Master to investigate, report, and recommend actions that the City could take to ensure compliance with the consent decree. The City agreed to his appointment.

them to determine whether in any given instance a suit . . . is an appropriate one for the exercise of the extraordinary powers of a court of equity." *Atlas Life Ins. Co. v. W.I. Southern, Inc.*, 306 U.S. 563, 568 (1939) (citations omitted). A federal court's decisions to exercise its equity powers is based upon the "body of doctrine" that includes federalism concerns. *See* Alan Effron, *Federalism and Federal Consent Decrees Against State Governmental Entities*, 88 Colum. L. Rev. 1796, 1798-99 (1988). These considerations include comity and institutional competence. These concerns are highly contextual and must be evaluated on a case-by-case basis.

Justice Black described the comity interest in *Younger v. Harris*, 401 U.S. 37, 44 (1971) as "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." He went on to explain that comity

> does not mean blind deference to 'States' Rights,' [but it] does represent . . . a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Id.

As comity relates to the reform of penal institutions, the Court has stated:

> It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons. . . . The strong considerations of comity . . . require giving the States the first opportunity to correct the errors made in the internal administration of their prison.

Preiser v. Rodriguez, 411 U.S. 475, 491-92 (1973).

The other concern is institutional competence. Federal courts are not in the business of running state penal institutions. Generally, federal courts properly defer to the policy decisions of prison officials who know best how to run correctional facilities. The Supreme Court has stated:

> [T]he problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.

Wolfish, 441 U.S. at 547. Moreover, in prison reform litigation, federal courts must "craft remedies with extraordinary sensitivity," *Inmates of Occoquan v. Barry*, 844 F.2d 828, 844 (D.C. Cir. 1988), "tak[ing] into account the interests of state and local authorities in managing their own affairs." *Id.* at 841 (citations omitted). "[W]here federal constitutional rights have been traduced, [however,] principles of

restraint, including comity, separation of powers and pragmatic caution dissolve. . . . " *Duran v. Carruthers*, 678 F. Supp. 839, 847 (D.N.M. 1988), *aff'd*, 885 F.2d 1485 (10th Cir. 1989), *cert denied*, 493 U.S. 1056 (1990). Nonetheless federal courts should always seek to minimize interference with legitimate state activities in tailoring remedies.

1. Standard of Review

A federal court has broad equitable remedial powers. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971); *Hoptowit*, 682 F.2d at 1245. The court's choice of remedies is reviewed for an abuse of discretion. *Id.* at 1245-46.[19]

In employing their broad equitable powers, federal courts should "exercise the least possible power adequate to the end proposed." *Spallone*, 493 U.S. at 280 (citations omitted); *Hoptowit*, 682 F.2d at 1247; *see also United States v. Michigan*, 940 F.2d at 167; *Newman v. Alabama*, 683 F.2d 1312, 1219 (11th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983).

Courts have conceded, however, that when the least intrusive measures fail to rectify the problems, more intrusive measures are justifiable. *Spallone*, 493 U.S. at 280

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[19] An abuse of discretion occurs when "no reasonable person could take the view adopted by the trial court. If reasonable persons could differ, no abuse of discretion can be found." *Duran v. Elrod*, 713 F.2d 292, 297 (7th Cir. 1983) (citation omitted), *cert. denied*, 465 U.S. 1108 (1984).

(if sanctioning city failed to induce compliance, court could consider sanctioning individual council members); *Hutto*, 437 U.S. at 688 n.9 (when state and local authorities fail to rectify a wrong, federal court may invoke its broad equity powers to remedy the situation); *Ruiz*, 679 F.2d at 1145-46 ("the remedy should begin with what is absolutely necessary. If those measures later prove ineffective, more stringent ones should be considered").

While there are federalism concerns in institutional reform litigation involving correctional facilities, they do not automatically trump the powers of the federal courts to enforce the Constitution or a consent decree. The *amicus* misstates the law when he argues that federal courts lack authority to employ the early-release and state-law-override mechanisms. The scope of the district court's power to fashion equitable remedies is highly contextual and fact dependent. One simply cannot state that there is *no* case in which the remedial scheme taken in this case is appropriate. The proper question is whether it is appropriate under the facts presented.

2. *Discussion*

Federal courts possess whatever powers are necessary to remedy constitutional violations because they are charged with protecting these rights. *Hutto*, 437 U.S. at 687 n.9; *Milliken v. Bradley (Milliken II)*, 433 U.S. 267, 280-81 (1977). "[T]he lower courts have learned from repeated investigation and bitter experience that judicial intervention is *indispensable* if constitutional dictates – not to mention considerations of basic humanity – are to be observed in the prisons." *Rhodes v. Chapman*, 452 U.S. 337,

353-54 (1981) (Brennan, J., concurring) (footnotes omitted); *see also Smith*, 611 F.2d at 1044 ("the federal courts have the power, and the duty to make their intervention [into operation of prisons] effective").[20]

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[20] The City argues that the scope of a federal court's equitable powers is narrower when the case involves a consent decree rather than a constitutional wrong. For a constitutional violation the text of the Constitution determines the appropriate standard of conduct. The standard for enforcing the consent decree, however, is determined by the terms of the agreement, much like a contract. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 574 (1984) ("the 'scope of a consent decree must be discerned within its four corners, and not be reference to what might satisfy the purposes of one of the parties to it' ") (quoting *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971)).

The consent decree in this case states that "this Decree does not constitute evidence or admission of liability of any party as to any issue of law or tort raised by the Complaint. . . . " Consent Degree ¶ I.B., at 2. It also states that "defendants do not admit to any violations of or failure to comply with applicable laws, rules or regulations, nor do defendants admit to any violation of constitutional standards." *Id.* ¶ II.B., at 2. The City therefore argues that the Sheriff's early-release authority cannot be justified as an exercise of the district court's authority to remedy constitutional violations. They argue that no constitutional violation exists here because overcrowding is not *per se* unconstitutional absent an explicit finding by the district court to this effect. *See Hoptowit*, 682 F.2d at 1249. Pretrial detainees cannot be confined in conditions that amount to punishment because they have not been convicted of any crime. *Wolfish*, 441 U.S. at 535 n.16; *Redman*, 942 F.2d at 1440 n.7. Overcrowding of pretrial detainees has been held unconstitutional. *Inmates of Allegheny County Jail v. Wecht*, 754 F.2d 120, 127 (3d Cir. 1985). While there may have been a constitutional violation in this case, the district court did not make such a finding.

Even if no constitutional wrong exists, it does not necessarily follow that the federal court's power to enforce the consent decree is somehow lessened. The Court held in *Local*

Moreover, in a line of cases relevant here, the Supreme Court has stated that otherwise valid state laws

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Number 93, International Association of Firefighters v. City of Cleveland, 478 U.S. 501, 525 (1986) that a remedial scheme embodied in a consent decree may be broader than that which a federal court could award after a trial on the merits. Moreover, several courts have held that federalism concerns do not prevent a federal court from enforcing a consent decree to which state officials have consented. *See United States v. City of Yonkers,* 856 F.2d 444, 454 (2d Cir.), *rev'd in part on other grounds sub nom. Spallone v. United States,* 493 U.S. 265 (1990); *Allen v. Alabama State Bd. of Educ.,* 816 F.2d 575, 577 (11th Cir. 1987); *United States v. District of Columbia,* 654 F.2d 802, 808 & n.11 (D.C. Cir.), *cert. denied,* 454 U.S. 1082 (1981). The City argues that they did not consent to the final expansion of the Sheriff's authority that is on appeal here, but they did consent to the initial early-release authority and the first expansion that allowed the Sheriff to disregard applicable state laws.

The City does not provide an alternative standard by which to evaluate the district court's ability to enforce a consent decree. We hesitate to follow those cases that hold that the state waives federalism objections when it enters a consent decree because the state actors involved in this case have not clearly consented to the federalism intrusions. We discern no reason, however, to treat this case differently from one based upon a finding of constitutional wrong. In *Badgley v. Santacroce,* 800 F.2d 323, 38 (2d Cir. 1986) (footnote omitted), *cert. denied,* 479 U.S. 1067 (1987), a case with facts similar to those here, the court stated:

> The respect due the federal judgment is not lessened because the judgment was entered by consent. The plaintiffs' suit alleged a denial of their constitutional rights. When the defendants chose to consent to a judgment, rather than have the District Court adjudicate the merits of the plaintiffs' claims, the result was a fully enforceable federal judgment that overrides any conflicting state law or state court order. The strong policy encouraging settlement of cases

or court orders cannot stand in the way of a federal court's remedial scheme if the action is essential to enforce the scheme. In the school desegregation area, the Supreme Court has stated, "[S]tate policy must give way when it operates to hinder vindication of federal constitutional guarantees." *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971).

In *Missouri v. Jenkins*, 495 U.S. 33, 57 (1990), another case involving school desegregation, the Court held, "Even though a particular remedy may not be required in every case to vindicate constitutional guarantees, where (as here) it has been found that a particular remedy is required, the State cannot hinder the process by preventing a local government from implementing that remedy."[21] In *Jenkins*, the district court had ordered that local taxes be raised in order to fund the desegregation plan. The court of appeals rejected this provision of the district court's order, but held that the court could empower the state tax assessor to raise the taxes in spite of state law that forbade the action. The Supreme Court upheld this latter exercise of federal equitable power, while invalidating the former. *Jenkins*, 495 U.S. at 51.

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requires that the terms of a consent judgment . . . be respected as fully as a judgment entered after trial.

[21] *See also Badgley*, 800 F.2d at 38 (state law does not prevent federal court enforcement of consent decree in prison overcrowding case).

In distinguishing the two approaches, the Court held:

> The difference between the two approaches [to impose the tax increase] is far more than a matter of form. Authorizing and directing local government institutions to devise and implement remedies not only protects the function of those institutions but . . . also places the responsibility for solutions to the problems of segregation upon those who have themselves created the problems.

Id.

In this case Judge Orrick gave the City several opportunities to comply with the consent decree. Before the district court initially ordered the early-release and citation-release provision, the City had not complied with the population levels established by the consent decree for over a year. In April 1987, the court postponed contempt sanctions to allow the city to create a plan to cure overcrowding problems that had persisted since mid-1985. In June, the court granted the Sheriff early-release authority, but by November the court issued an order to show cause why the City should not be held in contempt because Jail No. 1 remained overcrowded.

In January 1988, the district court found "egregious overcrowding" in Jail No. 1 and expanded the early-release provisions because the City still could not present a plan to cope with overcrowding. From that time until late 1988, the court deferred ruling on the pending contempt motion to allow the City adequate time to formulate a plan to address the problem.

The City complied with the consent decree's population levels in March 1989 under the threat of contempt

fines, but soaring population levels forced the plaintiffs to move for contempt again in May 1991. This time the court gave the City nearly nine months to comply before further expanding the early-release provisions and ultimately holding the City in contempt.

On each occasion that the district court granted the Sheriff early-release authority or expanded this authority, the City was given the opportunity to comply or develop a comprehensive plan to comply. In each case the City failed to develop a plan to alleviate overcrowding. Notably, the district court never ordered the City to take any particular steps to solve the problem. Instead the court allowed the City to consider the Special Master's recommendations and formulate its own plan. Such a course of action was consistent with comity and institutional competence concerns that delimit the exercise of the court's equitable discretion. It also was consistent with the principle that the federal courts "exercise the least possible power adequate to the end proposed." *Spallone,* 493 U.S. at 280.

Against this background the initial early-release and citation-release provisions were valid exercises of federal authority. The City originally agreed to the grant of early-release authority in June 1987. The district court's order allowed the Sheriff to release misdemeanants who had served ninety percent of their sentences. This provision did not allow the Sheriff to override applicable state laws because the Sheriff was able to place in incarceration alternative programs such as work furloughs.

The Sheriff was not required to exercise his authority to release inmates; he could exercise the authority as he

determined was necessary. In this sense, the early-release provision was an attempt to respect the institutional competence of prison administrators and minimize intrusion upon their authority.[22] *Cf. Jenkins*, 495 U.S. 51 (authorizing local authorities to implement remedies less intrusive than ordering them to do so directly).

After state court sentences began making inmates ineligible for these programs, the court ordered the state-law-override provisions. Before granting the authority to the Sheriff, the court had both parties brief the issue of whether it had the power to allow the Sheriff to disregard state laws. It was not an abuse of discretion for the district court to pursue this approach after the City failed to solve the problem on its own. *Hutto*, 437 U.S. at 687 (approving highly intrusive remedy after prison officials failed to comply with previous orders); *see also Hoptowit*, 682 F.2d at 1247; *Toussaint v. Yockey*, 722 F.2d 1490, 1494 (9th Cir. 1984). The federalism concerns were minimal because the court was not "restructur[ing] local government entities," *Milliken II*, 433 U.S. at 291, nor otherwise

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[22] The *amicus* points out that the use of the early-release authority has created a threat to public safety. This threat was minimized by placing the authority to release prisoners early in the Sheriff's hands. The Sheriff possesses the expertise to determine which prisoners are suitable for early release. The Sheriff could determine that no prisoners should be released because of the threat to public safety. The court's action was consistent with the principle that federal courts should defer to the administrative expertise of prison officials. Moreover, the studies cited by the *amicus* do not involve cases where the court has placed the authority in the hands of prison officials to make early release, and that the declarations submitted by the City on this issue have not been reviewed by the district court.

allocating authority to one branch of government when the state had chosen to allocate that authority to another, since the original provision did not allow the Sheriff to override state law. Moreover, the court had given the City repeated opportunities to develop a plan to solve the overcrowding problem. The only viable alternative at that point was to hold the City in contempt and impose drastic fines.

The court's expansion of the Sheriff's early-release authority to override applicable state law, however, presents a different case. The state-law-override provisions raise strong federalism concerns because the district court's action effectively reallocated legislative power to the executive.[23]

The City, relying on *Spallone,* somewhat ironically argues that contempt sanctions are a less intrusive alternative to rearranging the structure of state government via the state-law-override provisions. This argument has some appeal where the federalism concerns are great, a previous threat of contempt sanctions induced compliance in March 1989, and the fines would be held in a special City fund to pay for solutions to the overcrowding problem. Thus the court should have waited until the

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[23] While the Sheriff may have chosen not to exercise that authority, thus lessening somewhat the intrusion on state activities, the effect of the action, whether the Sheriff exercises the power or not, is at odds with state law. *See* n.3 *supra* (citing provisions overridden by district court's order.) It is the judiciary, not the Sheriff, that is responsible for imposing criminal sentences. *See In re Lynch,* 503 P.2d 921, 925 (Cal. 1972) (citation omitted).

threat of sanctions failed to induce compliance before authorizing the state-law-override provisions.

Furthermore, the district court did not make any findings that other alternatives were inadequate before it authorized the Sheriff to override applicable state laws. Such findings are essential for any grant of authority to be "least possible power to the end proposed." *Spallone*, 493 U.S. at 280.

The most recent expansion of the early-release provisions at issue in this appeal possesses the same infirmities. The court expanded the Sheriff's powers when it held the City in contempt, but did not wait to see if the threat of sanctions would induce compliance.[24] Moreover, the City states that it was investigating the availability of jail space in other counties. As with the previous order, the district court should have made findings that these alternatives were inadequate before authorizing any further override provisions. Absent such findings, the state-law-override provisions cannot be considered the option least intrusive on the operation of state government.

While we hold that the district court went too far under these circumstances in allowing the Sheriff to override state laws and state court sentences, we do not rule out the possibility that such action may be necessary in the future. *See Plyler v. Evatt*, 924 F.2d 1321, 1329 (4th Cir. 1991) (refusing to rule out possibility that court might

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[24] The plaintiffs argue that the release powers only could be used as a last resort, but this language does not apply to the override provision. Thus, the City correctly argues that the Sheriff was authorized to release inmates "regardless of whether doing so is necessary to assure compliance."

order early release to meet consent decree). If the threat of contempt sanctions proves ineffective and if the district court finds that other alternatives are inadequate, the court could consider authorizing the Sheriff to override certain provisions of state law to assure compliance. *See Jenkins*, 495 U.S. at 57; *Swann*, 402 U.S. at 45; *Badgley*, 800 F.2d at 38. In any event, the district court should tailor the grant of such authority as narrowly as possible so as to minimize the intrusion upon the state's affairs. At a minimum, the court should give the Sheriff override authority only as a last resort and only as essential to achieve compliance with the consent decree.

III. CONCLUSION

The district court's finding of contempt is **AFFIRMED.** That portion of its order allowing the Sheriff to override applicable state law in conducting early release or placing prisoners in the alternative programs listed in note 3, *supra*, is **VACATED**, and the remainder of the order is **AFFIRMED.**

The parties shall bear their own costs on this appeal.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED, and

Appellees' motion to issue mandate or in the alternative to lift stay is DENIED as moot.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WILL STONE, et al., Plaintiffs, vs. CITY AND COUNTY OF SAN FRANCISCO, et al., Defendants.	)	No. C-78-2774 WHO MEMORANDUM OPINION AND ORDER (Filed Dec. 17, 1991)

I. INTRODUCTION.

Plaintiffs brought this case action against defendants, City and County of San Francisco, Michael Hennessey, Sheriff of the City and County of San Francisco, Mayor of the City and County of San Francisco, Board of Supervisors of the City and County of San Francisco, and the Department of Public Health of the City and County of San Francisco, in 1978 to remedy allegedly unconstitutional conditions in the San Francisco County Jail located on the sixth floor of the Hall of Justice ("Jail No. 1"). On July 15, 1982, a Consent Decree ("Decree") was entered, which Decree has been supplemented by various orders from this Court. On May 31, 1991, plaintiffs moved the Court to hold defendants in contempt for failure to comply with the Decree and those Orders. The Court has held several hearings in the matter and the parties have submitted briefs and letters supporting their respective positions. Because the Court finds that defendants have not

been in compliance with the Decree and subsequent Court Orders, the motion is granted. The Court finds defendants in contempt of its Orders and will impose sanctions as set forth below.

II. HISTORY OF PROCEEDINGS.

A. The 1985 Contempt Motion and Resultant Court Orders.

The original action in this case was brought to remedy many unsatisfactory conditions in Jail No. 1, including understaffing, lack of recreation, medical and mental health care deficiencies, fire and safety hazards, and overcrowding. Paragraph XIV of the Decree ordered that:

> Excepting weekends and holidays, in no event shall any housing areas, including dormitories, regularly house more than their rated capacity, as set forth by the California Board of Corrections' Living Area Space Evaluation. . . .

In June 1985, plaintiffs moved to hold defendants in contempt for violating several provisions of the Decree, including those dealing with the facility's mandated population levels. Plaintiffs alleged, and defendants did not deny, that defendants had failed to comply with the provisions establishing population capacity from the inception of the Decree in 1982 to the filing of the motion in 1985. Plfs.' Statement of Facts and Mem. of Law in Supp. of Mot. for Contempt, Compliance and Appointment of Special Master, filed June 21, 1985, § III.

As a result of the 1985 motion, the Court ordered defendants to comply with the Decree, appointed a Special Master, and ordered the Special Master to investigate, report, and recommend actions defendants should take to ensure compliance with the Decree, as well as time limitations that might be deemed necessary to ensure such compliance. Stipulation and Order filed May 2, 1986.

B. Progress Reports of the Special Master and Resultant Court Orders.

From the date of his appointment, the Special Master has issued fourteen Progress Reports and two Addenda, each of which contained factual findings in draft form. The parties were given the opportunity to correct factual and other errors before the submission of the Progress Reports to the Court for further orders. All of the Special Master's Progress Reports have been in accordance with Rule 53(e)(1) of the Federal Rules of Civil Procedure, and all have been accepted by the Court as representing defendants' state of compliance with the Decree.

The First Progress Report found that there were violations of the Decree in many areas including staffing, recreation, medical/mental health care, and overcrowding. It concluded that these violations had continued from the adoption of the original Decree to the date of that Report. First Progress Report, filed Dec. 18, 1986.

Subsequent Progress Reports reached similar conclusions about violations of the Decree, including overcrowding. As a result, in 1987, the Special Master recommended that monetary sanctions be imposed against defendants. Third Progress Report, filed Feb. 25,

1987, at 62. At a status hearing on this matter, the Court observed:

> I'm very much disturbed by the lack of progress that's been made to comply with the rather specific statements set out in the Consent Decree, and I really think that I have been much too lenient with the responses – really non-responses – from the City.
>
> . . . . .
>
> The major issue, right at the outset, is whether the defendants are acting in good faith; and as I indicated, I think that the Sheriff has, and I am quite satisfied that the City hasn't. . . .
>
> Now, for example, the five years, almost to the day, when the Consent Decree was entered, I ordered the overcrowding to stop. It's more overcrowded today than it was then. And in that entire five years, I am advised by the Special Master that only 11 beds have been added. . . .

Rep. Tr., Apr. 30, 1987, at 4, 5.

Subsequently, defendants were ordered to cease both overall and individual cell overcrowding. The Court ordered:

> In the event that defendants fail to achieve either the overall capacity level for Jail No. 1 or the housing capacity levels set forth in Paragraph 2 of this Stipulation and Order by October 29, 1987, the Court shall consider the possible immediate imposition of monetary sanctions on defendants. . . .

Further Amended Stipulation and Order Requiring Compliance with Master's Recommendations, filed Aug. 12,

1987, at ¶18. To ease defendants' burden in complying with its Orders, the Court gave defendants special powers to deal with the overcrowding problem. For example, the Court required defendants to discharge uncharged detainees within thirty-six hours of booking. *Id.* at ¶¶5-7.

Nevertheless, in the Sixth Progress Report issued in November 1987, the Special Master once again found overcrowding. Sixth Progress Report filed Nov. 27, 1987. In January 1988, the Special Master issued an Addendum to the Sixth Progress Report in which he found continued serious overcrowding, and recommended that fiscal sanctions be imposed. The Special Master proposed:

> Because there has been a continued violation of population limits, continued use of safety cells beyond 24 hours and a failure to utilize all reasonable and necessary steps toward compliance, beginning January 15, 1988, the Court should ensure compliance through the use of a fiscal sanction which will act as an incentive and a resource for remedial programs not currently available.

Addendum, Sixth Progress Report, Jan. 4, 1988, at 28, ¶5. In its Order filed January 14, 1988, the Court found egregious overcrowding and a failure on defendants' part to correct the situation. It held:

> 1. The rated capacity of County Jail No. 1 was exceeded 15 times during November and December of 1987, the individual living unit capacities were exceeded 280 times in that same period, and a total of 951 inmates were confined in living areas in excess of State of California Board of Corrections' capacity limits.

> 2. Defendants have failed to take all reasonable steps to reduce overcrowding at Jail No. 1. . . . "

Order filed Jan. 14, 1988, at 2. Once again, the Court gave defendants specific powers to control the jail population. These powers included permitting the early release of prisoners who had served 70 percent of their sentences and the citation release of certain pretrial misdemeanants. *Id.* at 5-6, ¶4(c).

In spite of these grants of special powers and warnings concerning lack of compliance, defendants did not improve their compliance with the Decree. In the Seventh Progress Report, the Special Master found that in the spring of 1988, "[t]he housing capacity of the jail was exceeded on one occasion; the individual living units on 117 occasions; and 264 inmates were housed in living units which were illegally crowded." Seventh Progress Report, filed Apr. 25, 1988, at 70. In the next report, the Special Master found that the overcrowding had not abated. He reported 101 violations between April 1, and June 30, 1988. Eighth Progress Report, filed Aug. 26, 1988, at 45. The Special Master also found 142 violations between July 1, and October 31, 1988.

At a status conference on October 27, 1988, the Court found this overcrowding so serious that it ordered the imposition of fines if the situation was not immediately corrected.

> As of March 15, 1989, defendants shall be fined three hundred dollars ($300) per inmate per day for each inmate who exceeds the stated capacity of the individual housing units of Jail No. 1 as set forth in the California Board of Corrections'

> Living Area Space Evaluation, attached as Exhibit F to the Consent Decree. These fines may not be imposed if the Special Master certifies to the Court in writing that the crowding was a legitimate emergency or unanticipated event over which defendants had no control.

Order filed Nov. 28, 1988, at 2, ¶2.

As subsequent Progress Reports showed, between October 1988 and March 15, 1989, the overcrowding in Jail No. 1 was serious and regular. There were numerous occasions when individual living units were overcrowded and several thousand prisoners experienced unlawful living conditions. The inmate population during February 1989 was greater than at any previous time.

On March 15, 1989, defendants came into compliance with the population capacity levels as set forth in the Decree. According to the Progress Reports, a number of factors explained this unusual event. These factors included the opening of a new 300-bed institution, regular exercise of the powers granted by this Court to release inmates early, the threat of fines after March 15, 1989, and serious overcrowding of other facilities in San Francisco's jail system.

On April 1, 1991, defendants were held in contempt by the Court for violating staffing requirements of the Decree. The Court found that defendants had failed continuously to comply with the correctional and health care staffing requirements. It ordered that any future significant failure to comply with these staffing requirements would result in the imposition of fines in the amount of $250 per day per position. Order filed Apr. 1, 1991.

C. The Pending Contempt Motion.

The Progress Reports indicate that between March 15, 1989, and February 19, 1991, the total capacity of Jail No. 1 and the individual living units was not exceeded at any time. Then, beginning February 19, 1991, and extending through June 30, 1991, there were 30 occasions when the total jail capacity was exceeded, and 258 occasions when an individual living unit was overcrowded. During this period a total of 822 inmates were detained in living units in which the respective capacities exceeded the Court's Orders. Fourteenth Progress Report dated July 16, 1991.

On May 30, 1991, plaintiffs again moved this Court for an order (1) holding defendants in contempt, (2) seeking sanctions, and (3) ordering compliance with the Decree. This motion was based on violations of the Decree and the Amended Stipulation and Order filed August 12, 1987, stating that defendants could house no more than 426 inmates in Jail No. 1.

At a hearing on July 31, 1991, information presented to the Court, including the Fourteen Progress Report, clearly showed that defendants continued to incarcerate more offenders in Jail No. 1 than Court-approved capacities would allow. Defendants requested the opportunity to present a new plan to address the overcrowded conditions, and the Court took the matter under submission.

According to jail housing records, during the period July to October 1991, Jail No. 1 was intermittently overcrowded in excess of Court-established capacities. Between October 1, 1991 and November 4, 1991, individual housing units were exceeded every day but one. The

Court-approved population capacity was exceeded by 963 inmates. On November 4, 1991, 103 inmates were housed in unlawful conditions. On that date, the facility exceeded capacity by 25 percent. Decl. of Beth H. Parker in Supp. of Plfs.' Pending Mot. for Contempt, filed Nov. 7, 1991, at 2-3, ¶6.

During this period, defendants presented a plan to address overcrowding in the jail system and appropriated $500,000 for the purpose of implementing the plan. Defendants' plan calls for the crowding of Jail No. 7 by approximately 75 to 80 additional prisoners; the contracting of 25 work furlough beds; and the early release of 10 additional inmates monthly on county parole. Letter from Dennis Aftergut, Chief Assistant City Attorney to the Honorable William H. Orrick, Jr., Oct. 7, 1991. Although these programs have been instituted, Jail No. 1 was 78 inmates over capacity on November 6, 1991. (Data provided by the Special Master on November 6, 1991.)

At a hearing on this matter on November 7, 1991, defendants did not deny the overcrowding in Jail No. 1, but requested additional time to implement their plan to reduce population levels. There was no evidence presented at the hearing, however, that would indicate that defendants' plan to address overcrowding in Jail No. 1 would have any marked impact on current violations of the Court's approved population capacity levels.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW.

A. Findings of Fact.

Based on fourteen Progress Reports, oral representations, memoranda presented to the Court, and Court hearings, the Court makes the following findings of fact:

1. Between February 19, 1991, and June 30, 1991, there were 258 occasions when housing capacities in Jail No. 1 were exceeded and 822 inmates were illegally confined in overcrowded quarters.

2. Overcrowding has continued into the months of July, August, and September, normally the lowest population months of the year.

3. From October 1 through November 4, 1991, individual housing units were exceeded every day but one. The total number of inmates housed in excess of the Board of Corrections' rated capacity was 963 inmates. On November 4, 1991, 103 inmates were housed in unlawful conditions, filling the facility to 125 percent of capacity.

4. The Court notes the following relevant statistics for the period January 1, 1991, through June 30, 1991, as compared with the same period for 1990:

(a) There was a 10 percent decline in serious violent crimes and a 1 percent decline in all crimes.

(b) There was no increase in adult arrests.

(c) The Tenderloin Task Force increased its arrests in a specific geographic area by 58 percent.

(c) [sic] Total bookings into the jail system decreased.

(d) There was a 13 percent decrease in citation releases.

(e) There was a 5 percent decrease in the number of persons released on their own recognizance.

(f) There was a 22 percent decrease in the number of sentenced prisoners released early.

(g) There was an 18 percent decrease in the number of prisoners released on County Parole.

5. The increased arrests of the Tenderloin Task Force had only a marginal impact on jail overcrowding – representing an average of just seven more daily arrests than occurred in 1990.

6. Defendants developed no plan to accommodate any increased arrests as a result of the Tenderloin Task Force's increased activity.

7. Defendants did not avail themselves of the "emergency clause" provided by the Court for any overcrowding that was beyond defendants' control.

8. During the past year, the women's unit at Jail No. 3 was closed due to staff shortages that reduced the bed capacity of the jail system by 50 to 70 beds.

9. Some cells in Jail No. 3 are not being used due to disrepair of toilet facilities.

10. The Sheriff's population limits (but not the limits set by the State Board of Corrections) for Jails No. 2, No. 3, and No. 7 have been maintained, while the

Court-established limits for Jail No. 1 have not been maintained.

11. The Sheriff has presented numerous proposals to reduce overcrowding in the jail system, only a few of which the City has funded.

12. There is no factual data to support the claim that the City's Jail Management Plan or Jail Overcrowding Plan will reduce the jail population sufficiently to comply with the Decree and Court Orders.

13. Historically, all statistical data indicates that jail populations are low in the summer months but will increase dramatically during the fall and winter.

14. Even with warnings from this Court regarding the imposition of fines, defendants have violated the population limits on numerous occasions. This is true despite the efforts of Mr. Dennis Aftergut, Chief Deputy City Attorney, to coordinate efforts to bring about compliance with the Decree.

B. Conclusions of Law.

1. Title 18, U.S.C. § 401(3), and the inherent powers of the Court, enable a court to "adjudge in civil contempt any person who wilfully disobeys a specific and definite order requiring him to do or to refrain from doing an act." *Shuffler v. Heritage Bank*, 720 F.2d 1141, 1146 (9th Cir. 1983); *see also McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949); *Gifford v. Heckler*, 741 F.2d 263 (9th Cir. 1984). A court has the power to hold a party in civil contempt "to enforce compliance with an order of the court or to compensate for losses or damages." *Powell v.*

Ward, 643 F.2d 924, 931 (2d. Cir.) (quoting *McComb*, 336 U.S. at 191), *cert. denied*, 454 U.S. 832 (1981).

2. Plaintiffs have shown by clear and convincing evidence that a specific and definite order of this Court has been violated. *Balla v. Idaho State Bd. of Corrections*, 869 F.2d 461, 466 (9th Cir. 1989); *see also Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 777 n.1 (9th Cir. 1983).

3. Defendants have not performed all reasonable steps to insure compliance with the Decree and subsequent Court Orders. *General Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1379 (9th Cir, 1986); *Shuffler*, 720 F.2d at 1146. Despite notice and warnings, defendants have repeatedly violated the Decree and subsequent Court Orders.

4. This Court may impose sanctions, as a corollary to a finding of contempt, to coerce defendants into compliance with the Decree and subsequent Court Orders, and to compensate plaintiffs for the losses they have sustained. *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 443 (1986). Sanctions are not an uncommon remedy in jail condition cases. *E.g., Mobile County Jail Inmates v. Purvis*, 551 F. Supp. 92, 97 (S.D. Ala. 1982), *aff'd*, 703 F.2d 580 (11th Cir. 1983).

5. The standard for imposing fines is "the character and magnitude of the harm threatened by continuing contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired." *United States v. United Mine Workers of America*, 330 U.S. 258, 304 (1947); *Mobile County Jail Inmates*, 551 F. Supp. at 98.

6. Fines can be used to remedy the problem underlying the contempt citation. *See Local 28 of Sheet Metal Workers,* 478 U.S. at 421. Courts faced with prison overcrowding have ordered that fines collected as contempt sanctions be used to effectuate immediate population reduction. *Palmigiano v. DiPrete,* 710 F. Supp. 875, 884-85 (D.R.I. 1989), *aff'd,* 887 F.2d 258 (1st Cir. 1989); *Mobile County Jail Inmates,* 581 F. Supp. at 224.

7. This Court also has inherent authority to award fees in a civil contempt proceeding to enforce compliance with its orders. *Perry v. O'Donnell,* 759 F.2d 702, 705 (9th Cir. 1985).

8. Based on the foregoing findings of fact and conclusions of law, defendants are in contempt for violating the terms and provisions of the Decree entered into July 15, 1982, and subsequent Orders of this Court, requiring that the overall population of Jail No. 1 not exceed 426 inmates and the individual living units not exceed their rated capacities set by the California Board of Corrections.

IV. ORDER.

Accordingly, the Court has recognized the difficult financial problems impacting the City and its various departments and has exercised great restraint in not imposing sanctions. The court has also recognized the cooperation of the present City Attorney and, most particularly, Mr. Dennis Aftergut, Chief Deputy City Attorney, in attempting to coordinate the efforts being made to effect compliance with the Decree and the Court's Orders. The Court has further recognized the fact that the City

has appropriated an additional $500,000 to the Sheriff's Department to address the overcrowding issue, although it is presently unknown what impact this will have on the overcrowding problem.

Nonetheless, the time has come for the Court to compel compliance with its Orders. Financial necessity does not erase the constitutional rights of the persons who have endured and are enduring conditions violative of the Constitution of the United States and the Bill of Rights. As long ago as 1809, in *United States v. Peters*, 9 U.S. (5 Cranch) 115, 136 (1809), Chief Justice John Marshall said: "If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery. . . . " This is even more true today. This Court will not sit still for an effort to deprive citizens of important rights made available to them by the Eighth Amendment. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Plaintiffs having moved the Court on May 30, 1991, for an order finding defendants in contempt, sanctions, and an order commanding compliance with the Decree, the Court having heard oral argument of counsel and having reviewed the pleadings filed by the parties, and good cause appearing therefore,

IT IS HEREBY ORDERED that:

1. The Fourteenth Progress Report of the Special Master on Defendants' State of Compliance with the

Decree is adopted by the Court as the present status of defendants' compliance in this action.

2. Defendants are in contempt for violating the terms and provisions of the Decree entered into July 15, 1982, and subsequent Orders of the Court, requiring that living units in Jail No. 1 not exceed their rated capacities as set forth by the California Board of Corrections.

3. Defendants will comply immediately with the terms and provisions of the Decree and Orders of the Court relating to both overall capacity and the capacities of individual living units and intake cells at Jail No. 1.

4. Sanctions are awarded against defendants in the amount of $300 per day per person for each day after January 1, 1992, in which defendants violate this Court's Orders by either (a) exceeding the rated capacity limit for any of the individual housing units at Jail No. 1, or (b) exceeding the capacity limit for any of the intake units of Jail No. 1, or (c) exceeding the overall capacity limit of 426 inmates in Jail No. 1. The Court intends that defendants be fined for each inmate found to be housed in violation of the Decree or this Court's Orders, but that defendants shall not be fined twice for any single inmate so housed.

5. Beginning February 1, 1992, and on the first day of each month thereafter, the Special Master shall send to defendants a statement specifying the fines to be levied for any failure to comply with the population capacity limits in Jail No. 1 that occurred during the preceding month. The statement shall specify the number of inmates per day who exceeded the overall population capacity of 426, the number of inmates per day who exceeded the

capacity limits of the individual living units or intake units, and the total amount of fines levied.

Within ten days of receipt of such statement, defendants shall deposit the fine in an escrow account that shall be established by the Special Master at any state or federally chartered bank or savings and loan association under the name of "Stone v. City and County of San Francisco – Escrow Account." The Special Master shall provide the Court with a quarterly accounting of this escrow account. Any and all monies collected will be made available to the Sheriff of San Francisco County for programs that will have a direct bearing on the population levels of the jail system. The Sheriff shall first obtain the written consent of the Special Master as to the use of such funds, and such approval will not be unreasonably withheld.

Either side may file objections to the accuracy of the Special Master's statement. The pendency of any such objections, however, shall not defer defendants' obligation to pay the sum set forth in the statement. If the Court ultimately determines that any objection has merit, an appropriate adjustment will be made by a future order.

The Special Master may determine that a *bona fide* emergency, or a situation beyond the control of defendants, prevented defendants from maintaining Jail No. 1's populations living unit capacities at the proper levels. Prior to making such a determination, defendants must set forth in writing the emergency that must be clearly justified and made part of the record. If such a situation is found to be an emergency beyond the control of defendants, no fines shall be levied.

6. The Court modifies paragraph 4c on page 5 of its Order of January 14, 1988, in its entirety, to read as follows:

> Paragraph 5, on page 5, lines 1-6, is amended to read: Further, should the Sheriff be unable to maintain the population of Jail No. 1 within the capacity limits, he is hereby authorized to release as necessary to achieve those capacity limits, all sentenced misdemeanant prisoners within the San Francisco County Jail system who have served 50% or more of their sentences.
>
> To accomplish population reductions, this authority shall first be exercised as to prisoners who have served 90% or more of their sentences, and only then as to prisoners who have served 80% or more of their sentences, and only then as to prisoners who have served 70% or more of their sentences, and only then as to prisoners who have served 60% or more of their sentences, and, in the last resort, as to prisoners who have served 50% or more of their sentences.

7. In an effort to reduce jail overcrowding and to make maximum use of custody programs available under state law, the Sheriff is hereby authorized to determine the level of lawful custody for all sentenced prisoners in the San Francisco County jail system. In so doing, the Sheriff shall not be bound by state laws which restrict participation of inmates in work furlough programs (Cal. Penal Code § 1208), work in lieu of incarceration programs (Cal. Penal Code § 4024.2), electronic home detention programs (Cal. Penal Code § 1203.016), or county parole placement programs (Cal. Penal Code § 3076).

8. Appropriate attorneys' fees shall be awarded to plaintiffs for legal work performed in connection with this motion upon filing a motion for attorneys' itemizing the legal work performed to date and billing rates charged therefor.

Dated: December 17, 1991.

/s/ William H. Orrick
William H. Orrick
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WILL STONE, et al., Plaintiffs, vs. CITY AND COUNTY OF SAN FRANCISCO, et al., Defendants.	No. C-78-2774 WHO ORDER (Filed Dec. 18, 1991)

Good cause appearing therefore,

IT IS HEREBY ORDERED that the Memorandum Opinion and Order filed December 17, 1991, is amended by deleting the word "misdemeanant" on page 17, line 23.

Dated: December 18, 1991.

/s/ William H. Orrick
William H. Orrick
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WILL STONE, HENRY WASHINGTON, ALBERT MATIAS, FREDDY TOOKS, and JO ANN SPARKS, on behalf of themselves and all others similarly situated, Plaintiffs, v. CITY AND COUNTY OF SAN FRANCISCO; MICHAEL HENNESSEY, Sheriff, City and County of San Francisco; MAYOR OF THE CITY AND COUNTY OF SAN FRANCISCO; DEPARTMENT OF PUBLIC HEALTH OF THE CITY AND COUNTY OF SAN FRANCISCO, Defendants.	No. C 78-2774 WHO ORDER (Filed Dec. 30, 1991)

Defendants' Motion for Stay, Or In The Alternative, For Reconsideration, came on regularly for hearing before this Court on December 30, 1991. The Court having read the papers filed and considered the arguments of counsel, and good cause appearing,

IT IS HEREBY ORDERED that the Motion for Stay, Or In The Alternative, For Reconsideration, is GRANTED in part as follows:

The Court's Order of December 17, 1991, as modified December 18, 1991, is hereby modified, to replace the words "Sheriff of San Francisco County" on page 16, line

27, with the words "City and County of San Francisco", and to delete the phrase on page 16, lines 4-5 beginning with the word "exceeding" and ending with the letter "(c)." The motion for a stay is DENIED.

Dated: December 30 1991

/s/ William H. Orrick
William H. Orrick
United States District Judge

APPENDIX C

EXCERPT FROM CITY'S OPENING BRIEF IN THE NINTH CIRCUIT

II. THE RECORD DOES NOT SUPPORT THE DISTRICT COURT'S LEGAL CONCLUSION THAT THE CITY FAILED TO TAKE EVERY REASONABLE STEP TO INSURE COMPLIANCE.

In institutional reform litigation, this Court closely scrutinizes orders granting injunctive relief. *Toussaint v. McCarthy*, 801 F.2d at 1088-89. Under this standard, the District Court erred in concluding that the City failed to take every reasonable step to achieve compliance. This conclusion was based on factual findings suggesting that the City's noncompliance resulted from a lessening of effort and not from factors beyond the City's control, such as a need to insure public safety in high crime areas of the City. *See* Findings 4 – 11 of the Order, ER 545, pp. 10-12.[17] Some of these findings have no support in the record. Other findings have support but are incomplete or misleading in light of the record as a whole.

A. The Findings In The Order Do Not Support The Legal Conclusion.

We begin with Finding 4, which includes "relevant statistics" for January 1, 1991, through June 30, 1991, the

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[17] We do not discuss those findings which establish that violations have occurred (Findings 1-3, ER 545, p. 10), or may continue (Findings 12-14, ER 545, pp. 11-12). Those findings do not go to the issue here, namely, the City's reasonable efforts to comply.

period covered by the Special Master's 14th Progress Report, CR 544. ER 545, p. 10.

Finding 4(a): "There was a 10 percent decline in serious violent crimes and a 1 percent decline in all crimes."

Finding 4(b): "There was no increase in adult arrests."

Finding 4(c): "Total bookings in the jail system decreased."[18]

These findings strongly suggest that the crowding which occurred in the first half of 1991 cannot be explained by the City's need to respond to serious crime. The findings suffer from two basic defects.

First, the findings fail to distinguish between the first three months of the period and the second three months. Even the evidence submitted by the inmates shows that arrests were down in the first quarter, but were up in the second quarter. CR 569.[19] Similarly, while total bookings decreased for January through June 1991 as a whole, bookings *increased* in April, May and June 1991 as compared to 1990. *Ibid.* It was only during the second quarter

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[18] The Order includes two Findings of Fact numbered 4(c). The first Finding 4(c) states: "The Tenderloin Task Force increased its arrests in a specific geographic area by 58%." The record fully supports this finding.

[19] The Special Master's reports, on the other hand, suggest that arrests were up sharply from 1990. A comparison between the arrest statistics on page 27 the 12th Progress Report, with statistics on page 34 of the 14th Progress Report, indicates a 45% increase in arrests from the first five months of 1990 to the first five months of 1991. *See* Exh. C to ER 551. (Figures for June 1990 were not available in the 12th Progress Report. *Ibid.*)

that the Tenderloin Task Force began fully operating, *see* ER 506, 507, and crowding reached levels prompting the motion for contempt, *see* ER 426.

In addition, while the raw numbers of increased arrests and bookings for April-June 1991 may not by themselves explain the crowding which occurred in those months, the findings ignore the central fact which does: "A newly created Police Task Force operating out of the Tenderloin area made 1,121 arrests, *most of which were for offenses that prohibited bail, citation or early release." Id.*, p. 46 (emphasis added).

Finding 4(d): "There was a 13 percent decrease in citation releases."

Finding 4(e): "There was a 5% decrease in the number of persons released on their own recognizance."

Finding 4(f): "There was a 22% decrease in the number of sentenced prisoners released early."

Finding 4(g): "There was an 18% decrease in the number of prisoners released on county parole."

Taken together, these findings misleadingly suggest that the City relaxed its efforts to reduce the jail population. The record contradicts this suggestion.

First, these findings ignore the City's energetic efforts to make use of these release mechanisms. It is undisputed that the City's Sheriff operates the most expansive citation release program in California, and that the Department continued during 1991 to release by citation the maximum number of arrestees consistent with that policy. ER 529; CR 526. It is also undisputed that the Sheriff makes maximum use of his authority to release sentenced

inmates early. ER 554. In addition, "San Francisco continues to make extensive use of County parole." 14th Progress Report, Exh. D to ER 551. Indeed, this year the City funded additional deputy sheriffs to expand the program. ER 527, 529.

Second, these findings ignore the Special Master's recognition of why releases declined in 1991: The Tenderloin Task Force was arresting more individuals for offenses that made them ineligible for release. 14th Progress Report, p. 46, Exh. D to ER 551; *see also* ER 559.[20]

Third, the findings ignore the fact that as to OR releases, parole releases and releases of sentenced inmates, the most important decision-makers are state court judges. Although the City does not control their exercise of discretion, ER 523, we have worked energetically with the courts to increase the number of these releases. *Ibid.* Even so, the record establishes that the courts have reduced pretrial releases, ER 543, increased the restrictions on parole, ER 527, and lengthened sentences.[21] *See* 14th Progress Report. p. 37, Exh. D to ER 551. The City is not responsible for the declining numbers of these releases.

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[20] Citation releases of arrestees are limited by state law, to those charged with misdemeanor offenses. Cal. Penal Code § 853.6. Moreover, a state parolee arrested on a misdemeanor charge may not be released if a parole violation detainer has been filed. ER 505.

[21] These practices undoubtedly reflect the changing nature of the criminal defendants coming before the courts, ER 559, as well as legislative changes in the sentencing laws.

Finally, with respect to early releases of sentenced inmates, the District Court overlooked a critical factor accounting for this decline: The number of sentenced inmates (compared to pretrial detainees) in San Francisco's jails has decreased from previous years, making fewer releases of sentenced prisoners inevitable. *Ibid.* As the Court stated in *Plyer v. Evatt*, 846 F.2d 208, 213 (4th Cir. 1988): "[T]he District Court failed to consider additional evidence which clearly demonstrates that the continued effectiveness of these [early release] programs has been impaired because their extensive use has depleted the pool of inmates who can be released with a relative degree of safety to the public."

Finding 5: "The increased arrests of the Tenderloin Task Force had only a marginal impact on jail overcrowding – representing an average of just 7 more daily arrests than occurred in 1990."

The City has found nothing in the record supporting the conclusion that there was an average of just 7 more daily arrests in 1991 than occurred in 1990.[22] Moreover, Finding 5 is contrary to the Special Master's conclusion that "[t]he efforts of [the Tenderloin] Task Force could well account for some of the increasing Jail population that occurred in April-June." 14th Progress Report, p. 34, attached as Exh. C to ER 551. As discussed above, the accelerating rate of arrests of state parolees, ER 505, and of other serious criminals in the Tenderloin has had an undeniable impact on the jail population. 14th Progress Report, p. 46, attached as Exh. D to ER 551.

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[22] Unlike Finding 4, Finding 5 is not limited to the first half of 1991. ER 545, pp. 10-11.

Finding 6: "Defendants developed no plan to accommodate any increased arrests as a result of the Tenderloin Task Force's increased activity."

In fact, the record shows that in mid-1991, the City developed a plan to accommodate the crowding that coincided with the start of the Tenderloin Task Force. ER 554, 529, 551, 557. The City did not implement such a plan before the Task Force began operations for a simple reason: The Task Force consisted of officers on loan from other areas in San Francisco, ER 506, and the City anticipated that declining arrests in those areas would counterbalance the increasing arrests in the Tenderloin.[23] What the City did not anticipate was that the intensified police activity in the Tenderloin would result in arrests of so many more parolees and other offenders with the kinds of criminal records that prohibited citation and OR releases. 7/31/91 Tr., ER 513, p. 8. Once the impact of the Task Force became clear, the City developed a plan to add and save approximately 105 jail beds. ER 551.

The City recognizes that in the last quarter of 1991, the jail population has surged at a pace that has rendered this plan insufficient to comply with the Court's orders. The strength of this surge, however, was unexpected, even by those long familiar with the seasonal increase in the jail population during the fall and winter months. . . . The fact that an unanticipated increase in the population

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[23] In fact, in finding 5, the Court seems to be saying that is exactly what happened: The numbers of City-wide arrests increased only marginally. That finding seems inconsistent with the criticism implicit in Finding 6 – namely, that the City was remiss for not anticipating any increase in the number of arrests resulting in the Task Force.

rendered the plan insufficient is no basis for holding the City in contempt. *See Thompson v. Enomoto,* 542 F.Supp. 768, 769-770 (N.D. Cal. 1982) (finding of contempt not warranted where noncompliance is largely attributable to unanticipated increases in prison population and not to defendants' deliberate failures); *see also, Nelson v. Collins,* 659 F.2d 420, 427 (4th Cir. 1981).

Finding 7: "Defendants did not avail themselves of the 'emergency clause' provided by the Court for any overcrowding that was beyond defendants' control."

While true, this fact is not one for which the City should be held in contempt. The factors that caused the crowding at Jail No. 1, while beyond the City's control, were not of a short-term, "emergency" nature, such as crowding which might result from arrests due to mass demonstrations, civil disobedience or widespread looting after a natural disaster. In contrast, the rising jail population in 1991 resulted largely from (1) a change in law enforcement policy compelled by unacceptable levels of crime in certain areas of the City, a policy which has continued for eight months, and (2) increasingly restrictive release and sentencing orders in the Superior and Municipal Courts. These practices and policies do not qualify as "emergencies."[24]

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[24] The City should not be held in contempt under finding 7 for an additional reason: Invocation of the emergency clause would have been futile. The District Court and the Special Master had before them the facts concerning the Tenderloin Task Force and the practices of the Superior and Municipal Courts. (*See* 14th Progress Report, p. 34, 46, Exh. C and D to ER 551 and ER 543.) Nothing in the Court's orders prevented the Special Master from certifying an "emergency" without the

Finding 8: "During the past year, the Women's Unit at Jail No. 3 was closed due to staff shortages that reduced the bed capacity of the jail system by 50 to 70 beds."

The women's jail at San Bruno, which has a rated capacity of 48 beds, was not closed in 1991; it was closed in June 1990. ER 554. Thus, the unit was closed during a time when the City was in perfect compliance with population limits at Jail No. 1. *Ibid.* The facility was closed because its physical condition was deteriorating, it required an extremely inefficient use of the Sheriff's staff, and it was seismically unsafe. *Ibid.*

Once the City realized that the overcrowding that occurred in the first half of 1991 was persisting, the City chose to expand by 60-70 beds the capacity at a structurally sound facility built in 1989, rather than to put inmates in the unsafe women's facility. *Ibid.* This decision was a reasonable one, and does not support a finding of contempt.

Finding 9: "Some cells in Jail No. 3 [San Bruno Men's Jail] are not being used due to disrepair of toilet facilities."

In fact, although the City is in the process of repairing those toilet facilities, their repair will not affect the City's ability to comply with the population limits at Jail No. 1. *See* ER 529 and 554. That is because Jail No. 3 is operating at its operational capacity of 750 inmates, well

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City's request. The City respectfully submits that the Special Master did not do so because it would stretch the meaning of the term to certify as an "emergency" changes in police policy and in court practices extending over many months.

beyond the California Board of Corrections' population guidelines. *Ibid.* Based on experience in the facility, the Sheriff has determined that it would not be safe to house additional prisoners there. *Ibid.* The City's not having repaired the toilet facilities sooner has had no effect on the population at Jail No. 1. *Ibid.*

Finding 10: "The Sheriff's population limits (but not the limits set by the State Board of Corrections) for Jails No. 2, No. 3, and No. 7 have been maintained, while the Court-established limits for Jail No. 1 have not been maintained."

While true, this finding may be read to suggest that the City has not taken every reasonable step to comply with the Court's orders because the City could crowd further its other facilities beyond the population limits set by the Sheriff. This suggestion ignores the undisputed fact that it would be unsafe to crowd further the City's jail facilities not involved in this Consent Decree. *Ibid.* Creating unsafe conditions at those facilities is not a "reasonable step" to assure compliance with this Court's orders.

Finding 11: "The Sheriff has presented numerous proposals to reduce overcrowding in the jail system, only a few of which the City has funded."

There is no evidence in the record that the City has not funded any proposal by the Sheriff to reduce overcrowding in the jail system in 1991. Indeed, the record shows that in May 1991, the Mayor's Office initiated a $500,000 reserve fund to help reduce jail overcrowding. *See* ER 551. Another $500,000 had already been added to the Sheriff's budget to further the goals of the Decree, despite the fact that the City's general fund spending decreased for the first time in history. ER 557. This increase in spending for the Sheriff's Department

occurred while the City's Board of Supervisors was rejecting smaller appropriations for politically popular programs such as health clinics and additional AIDS relief. *Ibid.*; ER 528.

Significantly, the City has committed more than $30 million to comply with the Decree. ER 554. In the past four years, spending on the jails has risen far faster than for other City departments, and sometimes even at their expense. *Ibid.* Over the same period, increases for jail spending have been nearly twice as great as increases in the City's general fund spending as a whole. *Ibid.* The City opened one new jail in 1989 and is in the process of building another. ER 533. The record demonstrates that the City has devoted enormous resources to seeking compliance with the District Court's orders.

It is true, however, that the City denied funding requests from the Sheriff for a variety of programs in fiscal year 1989-90, when the City was in compliance with the Court's population limits. The bulk of the funding request was for expanding County Parole and the Sheriff's Work Alternative Program. The record shows, however, that additional resources for such programs would have provided diminishing returns in 1991. Given the more serious offenders being convicted, the Superior Court has increasingly prohibited convicted defendants sentenced to San Francisco County Jail from participating in such programs. ER 527. Accordingly, the failure to fund such marginally useful programs was no reason to hold in contempt a City which has devoted massive resources to its jails under the Decree. *Ibid.*

* * *

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No. 92-899

In The

Supreme Court of the United States

October Term, 1992

CITY AND COUNTY OF SAN FRANCISCO, ET AL.,

Petitioners,

vs.

WILL STONE, ET AL.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Should this Court grant certiorari to address the standard for finding a party in contempt when there is no conflict between the circuits and when, even under San Francisco's supposed "flexible" standard, it would still be found in contempt?

2. Should this Court grant certiorari to reverse long-standing jurisprudence and permit San Francisco to argue fiscal constraints as a defense to contempt when it sought no modification of the underlying court orders?

3. Should this Court grant certiorari to address whether the circumstances leading up to the contempt must be unforeseen or unforeseeable, when those circumstances have no bearing on the contemnor's diligence in complying with court orders?

4. Should this Court grant certiorari to reverse dictum on an issue which was decided in San Francisco's favor and issue an advisory opinion on a matter which may never arise?

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INTRODUCTION

There is nothing to review here. Petitioners the City and County of San Francisco ("the City") say "reasonable diligence" is different from "all reasonable steps," and so manufacture a conflict among the circuits, even though no circuit court has ever suggested, much less held, that there is any conflict at all. The City suggests defenses to contempt that no court has ever adopted and that conflict with long-standing precedent everywhere. And the City asks for an advisory opinion on an early release order that was vacated at its request and may never be reinstated.

This case is not about conflicting rules. It is about the factual finding, made by a district judge who has overseen this case since 1978 and unanimously affirmed by the Ninth Circuit, that San Francisco violated, repeatedly and continuously, court orders defining the constitutional limits on jail overcrowding. Those findings compel a finding of contempt even under San Francisco's imagined "flexible" "reasonable diligence" standard; even if any case supported a rule that financial constraints could be a defense to contempt; and even if a contemnor could avoid contempt based on a non-existent "unforeseen circumstances" test. San Francisco quarrels with the findings and reargues facts on which it lost in the two courts below. But this Court does not sit to review facts. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987). At bottom, that is what the petition demands. The petition should be denied.

STATEMENT OF THE CASE

Respondents, pretrial detainees housed at San Francisco's Jail No. 1, filed this class action in 1978 to remedy unconstitutional conditions in the sixth floor of the Hall of Justice. Among the conditions challenged was the untenable population level at Jail No. 1.[1] (CR 1)[2]

On July 15, 1982, the parties agreed to a Consent Decree, which was entered by the district court. (CR 201) The Decree set standards by which San Francisco was to manage the jail. It included a provision that the jail's individual housing areas should not regularly house more inmates than the capacity set by the California State Board of Corrections. (CR 201 ¶ XIV) Based on those population figures, the parties negotiated a number of other conditions for the jail's operation. They agreed, for example, on a classification system, a staffing plan, how many toilets, beds, and showers were needed, the level of medical and mental health care, and the like. (*E.g.*, CR 201; CR 275; CR 374) Once the population levels are exceeded, these other agreements become inoperable.

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[1] San Francisco's Jail No. 1 was constructed in 1962, primarily to house pretrial misdemeanants. It has five dorms of double-decker bunks designed to sleep 28 inmates, six tanks with 26 beds, and several tanks for specially classified inmates. Pretrial detainees spend virtually 24 hours a day in these dorms with nothing to do.

[2] "CR" refers to the Clerk's Record filed with the Ninth Circuit. "RT" refers to portions of the recorder's transcript which were not part of the Clerk's Record. "App.-___" refers to the Appendix filed with the City's Petition.

San Francisco represents that it had a history of "compliance" with the consent decree and that in 1991 something "dramatically changed." (Pet. at 8) The record, however, is just the opposite. The record proves a persistent pattern of contempt for both the lower court's orders and the rights, health, and safety of the pretrial detainees housed at the Jail No. 1. Compliance only occurred in the past after the threat of sanctions coerced it. Here is the full story.

In June 1985, the class first moved to hold San Francisco in contempt for violating several provisions of the Decree, including those dealing with the facility's mandated population levels. (App. A-2; CR 222) As a result of that motion, in May 1986, the district court ordered the City to comply with its orders and appointed a Special Master to investigate, report, and recommend actions San Francisco should take to ensure compliance. (App. A-3; CR 261) Every progress report which the Special Master filed that year indicated continuing violations of the Decree, including persistent overcrowding. (CR 267 at 57; CR 268 at 50; CR 271 at 41; CR 318 at 28-29) As a result, he recommended in March 1987 that the district court impose sanctions when the jail exceeded its population capacity. (App. A-3; CR 282 at 10-11; *see also* CR 319 at 30)

The district court held a hearing in April 1987 on the contempt motion. At San Francisco's request, it continued the matter until June to give the City time to present a plan to address the overcrowding. (App. A-3; 4/30/87 RT at 18-19) The court indicated it would impose contempt penalties, including fines, if the plan was unsatisfactory.

To thwart concerns about its persistent recalcitrance, San Francisco agreed in June 1987 that it would house no more than 426 inmates in Jail No. 1. (CR 314 at 2) It agreed that if it failed to achieve either the overall capacity level for the jail or the capacity levels for individual housing units, the district court could "consider the possible immediate imposition of monetary sanctions." (*Id.* ¶ 18; App. A-3)

Despite these warnings, San Francisco continued to overcrowd the facility. On November 28, 1987, the district court issued an order to show cause why the City should not be held in contempt for violating the overcrowding provisions of its orders. (App. A-4; CR 331) At the subsequent hearing two months later, the court found egregious overcrowding and a failure on San Francisco's part to correct the situation. (CR 363 at 2) Even then, it did not immediately impose sanctions but gave San Francisco still more time, and more powers, to control the population. Among these was the ability of the Sheriff to release "all sentenced prisoners within the San Francisco County Jail system who have served 90%, 80%, and 70% of their sentences" as necessary to achieve capacity limits. (*Id.* ¶ 4(c)) The Sheriff immediately began to exercise this power by releasing prisoners at 70% of time served. (CR 373 at 41)

Still, the overcrowding did not abate. Throughout 1988 the overcrowding continued. (CR 373 at 70; CR 383 at 45) The district court held hearings in April, July, and October on the pending motion for contempt. Each time, the court continued the hearing to allow San Francisco more time to comply with the population limits. (App. A-4) Finally, following a status conference in late October

1988, the court found the overcrowding so serious that it ordered the imposition of fines of $300 per inmate per day if the population was not at its mandated level by March 15, 1989. (App. A-4; CR 399 ¶ 2)

The overcrowding did not stop between October 1988 and March 1989. On March 15 – almost four years after the first contempt motion was filed and the exact date on which fines were to be imposed – San Francisco finally came into compliance with the population levels set forth in the 1982 Consent Decree. The threat of fines of $300 per inmate per day had its desired effect.

San Francisco did nothing, however, to plan longterm for its jail population. In September 1988, the National Council on Crime and Delinquency projected that San Francisco would need 2109 beds by 1992 (a number which turned out to be accurate). (CR 424 at 7) At that time, there were only 1786 beds available City-wide. Thus, San Francisco knew in 1988 that if it did not fully use the early release powers granted it by the district court, it would need an additional 500 beds. (*Id.*)

To wean San Francisco from the court's orders and encourage long range planning, the Special Master began recommending in early 1989 that the City develop a plan to address overcrowding. He made this recommendation in two separate progress reports, filed in February and December 1989, respectively. (CR 423 at 96; CR 438 at 75-76) On February 8, 1990, the district court adopted the Special Master's recommendation and ordered San Francisco to present such a plan by July 15, 1990. (CR 437)

Despite this clear mandate, the San Francisco Board of Supervisors did not approve a plan until June 17, 1991,

almost a year after it was required. (CR 544 at 40) And that plan did essentially nothing to avert the overcrowding problem. Indeed, most of the proposals that would have had an impact on jail crowding were eliminated from the final draft for fiscal reasons. (*Id.*) As a result, the Special Master concluded, the "current funded proposals will not measurably reduce the population confined in the San Francisco jail system . . . the long term Jail Population Management Plan will not materially affect the crowding that presently exists in the jail system." (*Id.* at 45) The proposals did not even begin to address the 500 beds saved through the Sheriff's use of the court-authorized release programs.

Although San Francisco remained in compliance with the population orders for almost two years, on February 19, 1991, it again began to overcrowd. Between February 19 and June 30, 1991, the total jail capacity exceeded the 426 inmate cap on 30 different occasions. In that four month period, individual living units were overcrowded on 258 occasions; 822 inmates resided in living quarters that exceeded the district court's orders. (CR 544 at 29)

On May 30, 1991, the class moved for an order (1) holding the City in contempt, (2) seeking sanctions, and (3) ordering compliance with the Decree. (CR 492) The district court set a hearing for late July. Despite the pendency of the motion, the overcrowding did not abate. May, June, and July all saw chronic overcrowding. (CR 511, Ex. A) Both overall capacity and individual housing units regularly exceeded their agreed-upon levels.

These dramatic population increases occurred in 1991 despite a decrease in violent crimes reported during the

same period. The number of the most serious crimes committed went down almost every month between January and November 1991 as compared to 1990. (CR 569, Ex. A) Both reported offenses and total jail bookings decreased in the first six months of 1991 compared with 1990. (CR 544, at 33-34) And, although the jail was substantially more overcrowded in the fall of 1991 than it was during the spring, total arrests were actually lower in September through November 1991 as compared to March through May 1991. (CR 569, Ex. A)

At a hearing on July 31, 1991, the district court found that San Francisco had continued to exceed the capacity levels at Jail No. 1. (CR 513 at 17:24-18:3) When the City requested time to present a plan to address the problem (*id.* at 3), the court took the matter under submission. (*Id.* at 21:2-3) San Francisco acknowledged the blatant overcrowding but sought the district court's indulgence to develop a plan. It stated that if the plan was not acceptable, "the sword could fall." (*Id.* at 10, 16)

Rather than hear the matter in September as the parties had requested, the court postponed the second hearing on San Francisco's plan to avoid overcrowding until November 7, 1991. (CR 516) In the fall, as the class and experts had predicted, matters dramatically worsened. Between October 1 and November 4, 1991, individual housing units exceeded capacity every day but one. (CR 520 ¶ 5) During that one-month period, 963 inmates resided in unlawful conditions. (*Id.* ¶ 6)

At the second contempt hearing in November, the class submitted uncontroverted evidence that overcrowding had not abated since July, but had skyrocketed. (*Id.*)

The plan the City had promised to present "in a matter of a few weeks" after the July hearing (CR 513 at 11:5-6) had only recently materialized. It had not, however, been fully implemented. (CR 521 at 11) San Francisco did not deny the overcrowding, but again requested additional time to present a further plan to reduce the population. (*Id.* at 16:20-21) Once again, the district court took the matter under submission. (*Id.* at 19)

In December, the jail's population exploded. On December 2, 1991, for example, the jail was 133% of capacity. Twelve housing units exceeded capacity that day, some by close to 75%. Dorms 1 through 4, rated for 28 men, held approximately 48 inmates each. (CR 539, Ex. A)

On December 17, 1991, the sword fell. The district court found San Francisco in contempt for violating a series of court orders setting population levels at Jail No. 1. (App. B-15) It found the City had not taken all reasonable steps to ensure compliance. (*Id.* at 12-13) It ordered that beginning January 1, 1992, sanctions of $300 per day per person would accrue for each day San Francisco violated the population orders. (*Id.* at 15-16) All monies collected were to be made available for programs that would have a direct bearing on the jail's population levels. (*Id.* at 17)

On December 26, 1991, San Francisco filed a motion requesting that the court stay the order pending appeal or, in the alternative, reconsider its opinion. (CR 549) On December 30, the court denied both requests. (CR 572) The court again concluded that San Francisco had not taken all reasonable steps to comply with the Consent

Decree and subsequent orders. (CR 570 at 28:9-11) Among the steps which the court found the City could have taken but did not were:

> activation of the closed women's jail in San Bruno; renting of jail space from Alameda County; contracting with private vendors and halfway houses for work furlough beds; use of private contractor electronic supervision programs; partial use of the gymnasium in the Hall of Justice as a dormitory; termination of the contract with the U.S. Marshal for use of beds in the San Francisco jail system; and use of the emergency population procedures provided for in the August 12, 1987 order of the court.

(*Id.* at 28:13-22)

On December 31, 1991, San Francisco filed its notice of appeal. (CR 573) The appeal was expedited by the Ninth Circuit on January 8, 1992, and the contempt order stayed pending its resolution.

On June 25, 1992, a unanimous panel of the Ninth Circuit affirmed the district court's finding of contempt and imposition of prospective sanctions. It vacated a portion of the order which enabled the Sheriff to release inmates at 50% of time served to ensure compliance with the population orders. (App. A-33) The Ninth Circuit denied San Francisco's petition for rehearing and suggestion for hearing en banc on August 30. On November 23, 1992, San Francisco filed its petition for a writ of certiorari. Both the Ninth Circuit and The Hon. Sandra Day O'Connor, Circuit Justice for the Ninth Circuit,

denied San Francisco's application for a stay of the mandate pending its petition for a writ of certiorari.

SUMMARY OF ARGUMENT

San Francisco asserts four reasons why this Court should grant its petition for writ of certiorari and reverse a finding of contempt entered by a district court who has overseen this litigation for fourteen years and unanimously affirmed by the Ninth Circuit. Not one has merit.[3]

First, the City claims this Court needs to resolve a conflict between the circuits as to the standard for finding a party in contempt. No circuit has ever said there is a conflict; only San Francisco has manufactured it. The alleged "conflict" is one of semantics. In substance, the two standards are the same, the courts use them interchangeably, and they have the same end effect.

Even if there were an issue for this Court to resolve, this case does not present it. For even were this Court to adopt the more flexible standard which San Francisco proposes, it would not change the result. San Francisco was not "reasonably diligent" in complying with the

[3] Heightened deference should be accorded to the district court here because Judge Orrick has been involved with this case since 1978 and overseen the implementation of the consent decree for more than a decade. (App. A-12) *See Rufo v. Inmates of Suffolk County Jail*, 112 S.Ct. 748, 765 (1992) (O'Connor, J., concurring); *Hutto v. Finney*, 437 U.S. 678, 688 (1978) (substantial deference given to district court's "years of experience with the problem at hand.")

district court's population orders, no matter how loosely defined that term is.

San Francisco's second reason for certiorari is equally spurious. It claims this Court should decide that a lower court should consider a government's fiscal constraints before adjudging it in contempt. This holding would reverse two long-standing doctrines. It would undermine the principle reaffirmed just last term that fiscal constraints cannot be used to justify the creation or perpetuation of constitutional violations. It would also enable parties, such as San Francisco here, to violate a court order and then challenge the validity of the underlying order as a defense to contempt.

San Francisco proposes, third, that the Court decide whether a defendant in a contempt proceeding must show that the circumstances giving rise to the violation were foreseeable. It provides no reason why this issue need be decided. There is none. The circumstances leading up to the contempt are irrelevant to the inquiry before the district court. The court must analyze instead the efforts the party has made once the violations have occurred to come into compliance.

Fourth, San Francisco seeks review of dictum in the Ninth Circuit opinion on an issue which the panel decided in San Francisco's favor. A party cannot appeal a ruling favorable to it. Nor can it ask for an advisory opinion where the district court has not yet applied the dictum and may not ever do so, thus providing no factual record to review.

REASONS FOR DENYING THE WRIT

A. THERE IS NO CONFLICT AMONG THE CIRCUITS AS TO THE PROPER STANDARD FOR HOLDING A GOVERNMENT DEFENDANT IN CONTEMPT.

1. No Case Supports San Francisco's Distinction Between "Reasonable Diligence" and "All Reasonable Steps"

San Francisco urges this Court to grant certiorari to resolve an alleged conflict between the circuits as to the standard for holding a party in civil contempt. (Pet. at 11) According to San Francisco, "reasonable diligence" is different from, and more "flexible" than, "all reasonable steps," and the circuits disagree on which standard applies. In fact, only San Francisco imagines a conflict. No court has ever found the standards to conflict; the cases use the terms interchangeably.

The only difference between the two formulations is a semantic one. Some courts describe the standard for contempt as "reasonable diligence." Others phrase it as "all reasonable steps." It is a distinction without a difference. No case suggests that a defendant can avoid contempt without making every reasonable effort to comply with a valid court order. Nor does any case so much as hint that the exercise of "reasonable diligence" requires anything less than the taking of "all reasonable steps."

The practical application of the two standards is also the same. Both rules require substantial compliance with the court order to avoid a finding of contempt. *See, e.g., Langton v. Johnston,* 928 F.2d 1206, 1220 (1st Cir. 1991)

("reasonable diligence" circuit stating formulation of its test as "satisfaction by diligent, good faith efforts, culminating in substantial compliance."); *Balla v. Idaho State Bd. of Corrections*, 869 F.2d 461 (9th Cir. 1989) ("all reasonable steps" circuit stating that "substantial compliance with a court order is a defense to an action for civil contempt."); *General Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1379 (9th Cir. 1986). Neither finds technical inadvertence to be grounds for contempt. *E.g., National Advertising Co. v. Orange*, 861 F.2d 246, 250 (9th Cir. 1988); *General Signal Corp.*, 787 F.2d at 1379. Neither permits "good faith" as a defense. *E.g., Newman v. Graddick*, 740 F.2d 1513, 1525 (11th Cir. 1984); *Donovan v. Mazzola*, 716 F.2d 1226, 1240 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984); *Fortin v. Commissioner of Mass. Dept. of Public Welfare*, 692 F.2d 790, 796 (1st Cir. 1982).

Indeed, the courts use the two phrases interchangeably to describe the standard of compliance in a contempt proceeding.[4] Even those courts which, according to San

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[4] *See, e.g., Powell v. Ward*, 487 F. Supp. 917 (S.D.N.Y. 1980), *modified*, 643 F.2d 924 (2d Cir. 1981) (because the relevant question is whether defendants "have been reasonably diligent," a contempt finding is appropriate where defendants have failed to make "all reasonable efforts" to comply); *Alberti v. Klevenhagen*, 610 F. Supp. 138, 141 (S.D. Tex. 1985) (court looked to whether defendants took "all reasonable steps" to insure compliance and found them in contempt because they had "not been reasonably diligent"); *Nelson v. Collins*, 659 F.2d 420, 431-32 (4th Cir. 1981) (Winter, J., concurring and dissenting) (no defendant who has been "reasonably diligent" can be held in contempt; thus no contempt where defendant took "all reasonable steps" to eliminate overcrowding); *Reed v. Rhodes*, 500 F. Supp. 363, 400 (N.D. Ohio), *aff'd in part and rev'd in part*, 635 F.2d 556

Francisco, favor one usage over the other, do not do so exclusively.[5] Courts discussing the standard for contempt routinely rely on cases from circuits which, according to San Francisco, are in direct conflict.[6]

(6th Cir. 1980) (relevant inquiry is whether defendants took "all reasonable steps" to insure compliance; defendants' failure to exercise "reasonable diligence" thus led to finding of contempt).

[5] For example, *Powell v. Ward*, a case out of the Second Circuit (which San Francisco designates a "reasonable diligence" circuit) finds contempt where the defendant failed to make *"all reasonable efforts"* to comply with the court's order (emphasis added). Conversely, in *Thompson v. Enomoto*, 542 F. Supp. 768, 769 (N.D. Cal. 1982), out of the Ninth Circuit (which San Francisco deems an "all reasonable steps" circuit) the court stated that it could not find defendants in contempt of court "where . . . defendants have been *reasonably diligent* in attempting to accomplish what was agreed to in the Decree." (emphasis added)

[6] *See, e.g., United States v. Darwin Construction Co.*, 873 F.2d 750, 755 (4th Cir. 1989) (Fourth Circuit case requiring "all reasonable steps" relies on cases from Ninth, Eleventh, Fifth, D.C., and Third Circuits); *Glover v. Johnson*, 934 F.2d 703 (6th Cir. 1991) (Sixth Circuit case requiring "all reasonable steps" relies on cases from First and Second Circuits); *United States v. Hefti*, 688 F. Supp. 1367, 1370 (E.D. Mo. 1988), *aff'd*, 879 F.2d 311 (8th Cir. 1989) ("all reasonable steps" case from Eighth Circuit relies on cases from Second, Fourth, and Ninth Circuits); *Morales Feliciano v. Hernandez Colon*, 697 F. Supp. 26 (D.P.R. 1987) ("all reasonable steps" case from First Circuit relies on cases from Second, Ninth and D.C. Circuits); *Mobile County Jail Inmates v. Purvis*, 551 F. Supp. 92 (S.D. Ala. 1982), *aff'd*, 703 F.2d 580 (11th Cir. 1983) ("all reasonable steps" case from Eleventh Circuit relies on cases from First and Ninth Circuits); *Reed v. Rhodes*, ("all reasonable steps" case from Sixth Circuit relies on cases from First, Second, Third, Ninth, and D.C. Circuits); and *Palmigiano v. Garrahy*, 448 F. Supp. 659 (D.R.I. 1978) ("all reasonable steps" case from First Circuit relies on cases from Second and Ninth Circuits).

Not one of these cases suggests that there is a difference between "reasonable diligence" and "all reasonable steps. An understanding of the "reasonably diligent" test explains why. Diligence is relevant to the question of a party's ability to comply with a prior court order. Inability is a defense to contempt. *United States v. Rylander*, 460 U.S. 752, 757 (1983). A contemnor has the burden to demonstrate impossibility or inability to comply, *id.*; *United States v. Fleischman*, 339 U.S. 349, 362-63 (1950), which burden is difficult to meet. *Fortin*, 692 F.2d at 796; *National Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 713 (D.C. Cir. 1974). Thus, reasonable diligence in context means that that despite its best efforts, a contemnor has still been unable to comply with a prior court order. If successful, this would amount to the alleged contemnor having taken all reasonable steps.

Citing nothing, San Francisco offers two supposed differences between "reasonable diligence" and "all reasonable steps." First, San Francisco argues that under the supposedly more lenient "reasonable diligence" test, courts will examine a defendant's compliance efforts no matter how extreme the noncompliance. Not so, it implies, for "all reasonable steps." (Pet. at 15) What San Francisco ignores, however, is that a court must make this examination in every contempt proceeding. Defendants are not strictly liable for violating court orders. Whenever a court determines that a violation has occurred – extreme or otherwise – it must decide whether the defendant exerted adequate efforts to avoid its occurrence.[7]

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[7] Indeed, the district court here did just that. It did not, as San Francisco implies, merely presume the City's contempt

Second, the City attempts to distinguish "reasonable diligence" from "all reasonable steps" by mischaracterizing what "all reasonable steps" entails. San Francisco insists that "all reasonable steps" actually requires "perfect diligence." (Pet. at 14) "Good advocates," it argues, "will always be able to come up with one more 'reasonable step' . . . " (*Id.*)

But again, no court has so held. The Ninth Circuit rejected this interpretation when San Francisco made it on appeal. It denied that "all reasonable steps required perfection: "The City mischaracterizes the 'every reasonable step' rule by asserting that it must consider every option that the court could conceive." (App. A-14) Its opinion reaffirmed long-standing law that technical or inadvertent violations will not support a finding of contempt. (App. A-14, *citing General Signal Corp.*, 787 F.2d at 1379) Thus, no court, including the Ninth Circuit, has held that "all reasonable steps" is different from "reasonable diligence," much less that the standard requires perfection.

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upon finding the court order violated. Rather, just as in *SEC v. Porto*, 739 F. Supp. 1236 (N.D. Ill. 1990), and *New York State NOW v. Terry*, 697 F. Supp. 1324, 1332 (S.D.N.Y. 1988), *aff'd in part and modified in part*, 886 F.2d 1339 (2d Cir. 1989), which the City cites, the district court examined San Francisco's compliance efforts before making any finding of contempt. (App. B-9) As in *Porto* and *Terry*, San Francisco's efforts were found inadequate. (App. B-11 – B-13) Thus, the degree of San Francisco's noncompliance did not compel the court's finding of contempt; its failure to exert adequate efforts to comply did.

2. Even If the Standards Differed, this Case Would Not Put the Issue; San Francisco Was In Contempt Under Any Standard

Even if there were a conflict, the Court would have no occasion to decide it here. Whatever the standard, the City was in contempt. Before a party can invoke "reasonable diligence" as a defense, it must be in substantial compliance. *Langton v. Johnston*, 928 F.2d 1206, 1220 (1st Cir. 1991); *Howard Johnson Co. v. Khimani*, 892 F.2d 1512, 1516 (11th Cir. 1990) ("Conduct that evinces substantial, but not complete, compliance with the court order may be excused if it was made part of a good faith effort at compliance."). San Francisco has not been in substantial compliance with the lower court's orders since February 1991 when overcrowding resumed. (App. B-10) Even after the class filed for contempt in late May, the City continued to overcrowd Jail No. 1. At the time the district court found San Francisco in contempt eight months later, the jail was operating at 130% capacity. Dorms rated for 28 men held on average 48 inmates each. (CR 539, Ex. A)

San Francisco also can show no diligence in achieving compliance. The district court waited seven months after the motion was filed before finding the City in contempt. During that time, the overcrowding did not abate; it dramatically worsened. In April 1991, the month before the motion was filed, 541 pretrial detainees were confined in excess of the Jail's capacity limits. In the month of October, six months later, individual housing units exceeded capacity every day but one. 963 inmates resided in unlawful conditions, almost double the April figure. (App. B-8 – B-9) As the Ninth Circuit recognized, this delay in obeying court orders alone justified the

finding of contempt. (App. A-15) *See Toussaint v. McCarthy*, 597 F. Supp. 1427, 1430 (N.D. Cal. 1984) (undisputed delay of eight months in obeying court order "sufficient in itself to establish that respondents . . . did not act with reasonable dispatch.")

The record also amply demonstrates that San Francisco did virtually nothing while the contempt motion was pending to stem the rampant overcrowding. Twice, it begged the district court to postpone a finding of contempt so it could develop a plan. (CR 513 at 3; CR 521 at 16) Twice, the court indulged the City's wishes. (CR 516; CR 521 at 16) At the second hearing in November 1991, San Francisco finally presented a plan. But the measures had not been fully implemented. (CR 521 at 11) As the district court found and the City later admitted, the 105 beds the plan theoretically created were insufficient to achieve compliance with the district court's population orders and to remedy the overcrowding it knew would escalate in the coming winter months. (App. B-9)

San Francisco asks the Court to second guess both lower courts' findings by pointing to its "tremendous commitment of resources" as the "strongest evidence" of its diligence. (Pet. at 16) The figures it cites, and the programs it claims to have instituted, however, are highly inflated. Little of the "$30-plus million" the City repeatedly quotes (Pet. at 16) was spent to reduce overcrowding at Jail No. 1; that sum includes monies spent for virtually every program instituted in recent years throughout San Francisco's jail system. It includes funds to upgrade Jail No. 1, increase staffing at Jail No. 3, build a recreation center at the Hall of Justice, renovate a short term medical facility, and construct a new medical and mental

health center.[8] The first "$500,000 budget reserve" went primarily for emergency staffing at Jail No. 3; only $20,000 (4%) went directly to Jail No. 1.

Finally, San Francisco suggests that its exploration of renting jail beds in neighboring counties evidences its diligence. (Pet. at 17) In fact, it did not even consider this option until the contempt motion had been pending several months. (CR 554) It did not implement it until April 1992, fifteen months after the overcrowding began, almost a year after the contempt motion was filed, and five months after the contempt order issued. Had it been reasonably diligent, San Francisco would have investigated this option when overcrowding began or the class moved for contempt. At the very least, it should have explored it when the availability of Alameda County beds was published in the local papers in September 1991. "County Jail Seeks More U.S. Prisoners," *The San Francisco Chronicle*, at A14 (Sept. 10, 1991).

In sum, San Francisco's devotion to the overcrowding crisis has been anything but diligent. Even were this Court to adopt the more flexible standard which the City suggests, it would still be found in contempt.

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[8] San Francisco operates four jails. Jails No. 1 and No. 2 are located on the sixth and seventh floors of the Hall of Justice. Jails No. 3 and No. 7 are located in the neighboring city of San Bruno, California. The lawsuit only concerns Jail No. 1.

B. PERMITTING A GOVERNMENT DEFENDANT TO PLEAD POVERTY AS A DEFENSE TO CONTEMPT WOULD REVERSE LONG STANDING LEGAL PRINCIPLES.

San Francisco urges this Court to grant certiorari to decide whether a court should consider a local government's fiscal constraints in measuring its ability to comply with a consent decree. (Pet. at 20) It claims *Rufo v. Inmates of Suffolk County Jail*, 112 S.Ct. 748 (1992), opens the door to relax the required obedience to court orders for government defendants in times of fiscal austerity. It seeks to extend dictum in that case, which enunciated standards for modifying consent decrees, to one where no modification was sought and a party was found in contempt.

But modification is not contempt, and no case, much less *Rufo*, has ever applied the same standards to these two, very different, situations. All that *Rufo* did was instruct lower courts to take financial constraints into account in considering how to tailor a consent decree modification to meet significantly changed circumstances. 112 S.Ct. at 764. *Rufo* explicitly reaffirmed well established law that "financial constraints may not be used to justify the creation or perpetuation of constitutional violations." 112 S.Ct. at 764; *see also* 112 S.Ct. at 766 (O'Connor, J., concurring).[9]

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[9] Virtually every federal circuit has recognized this time honored principle. *E.g., Morgan v. District of Columbia*, 824 F.2d 1049, 1067-68 (D.C. Cir. 1987); *Toussaint v. McCarthy*, 801 F.2d 1080, 1110 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987); *Lareau v. Manson*, 651 F.2d 96, 104 (2d Cir. 1981); *Smith v.*

Permitting local governments to assert lack of resources as a defense to contempt of a court order would contradict this long standing principle. A consent decree entered in institutional reform litigation is an agreement between the parties, approved by the court, to ensure compliance with constitutional requirements. Allowing a governmental entity to use fiscal constraints to avoid its obligations under a decree would guarantee the use of this defense to perpetuate constitutional violations.[10]

Sullivan, 611 F.2d 1039, 1043-44 (5th Cir. 1980); *Battle v. Anderson*, 564 F.2d 388, 396 (10th Cir. 1977); *Jackson v. Bishop*, 404 F.2d 571, 580 (8th Cir. 1968).

[10] This is precisely what would happen here. The Consent Decree and subsequent court orders set a capacity level for both individual housing units and the overall facility at the level rated by the California State Board of Corrections. San Francisco overcrowds the facility when it exceeds those levels. Because Jail No. 1 houses pretrial detainees who retain the presumption of innocence pending trial, they may not be confined in conditions amounting to punishment. *Bell v. Wolfish*, 441 U.S. 520, 536 (1979). Courts have regularly found overcrowding unconstitutionally punitive for this class of prisoners. *See, e.g., Inmates of Allegheny County Jail v. Wecht*, 754 F.2d 120, 127 (3rd Cir. 1985); *Lareau*, 651 F.2d at 105; *Gross v. Tazewell County Jail*, 533 F. Supp. 413, 419 (W.D. Va. 1982); *Rutherford v. Pitchess*, 457 F. Supp. 104, 109 (C.D. Cal. 1978).

San Francisco attempts to avoid this obvious result by maintaining that the district court made no finding of any constitutional violation. (Pet. at 19) This is incorrect. The contempt order repeatedly states that inmates have been housed "unlawfully" and "illegally." (App. B-7, B-10) In assessing fines, the district court said that it "would not sit still for an effort to deprive citizens of important rights made available to them by the Eighth Amendment." (App. B-15) Moreover, by specifying measures to alleviate overcrowding in its court orders, the district court implicitly recognized the

Moreover, San Francisco's proposed rule would create legal havoc, not harmony. This Court has long held that one cannot violate a court order and then, as a defense to the contempt, challenge the validity of the underlying order. *See GTE Sylvania, Inc. v. Consumers Union*, 445 U.S. 375, 386-87 (1980); *Maggio v. Zeitz*, 333 U.S. 56, 69 (1948). A party's remedy is to seek modification of the order before a violation occurs. *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 439-40 (1976); *Walker v. Birmingham*, 388 U.S. 307, 316-21 (1967). It cannot violate its precepts and then argue the original order was unjust. As this Court has said:

> It would be a disservice to the law if we were to depart from the long-standing rule that a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy. The procedure to enforce a court's order commanding or forbidding an act should not be so inconclusive as to foster experimentation with disobedience.

United States v. Rylander, 460 U.S. 752, 756 (1983); *Maggio*, 333 U.S. at 69.

Permitting a party to claim lack of financial resources as a defense to contempt would "foster" such "experimentation." It would encourage government defendants to ignore existing court orders and, after the fact, argue fiscal constraints prevented their compliance. As the

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existence of unconstitutional conditions. *See Newman v. Alabama*, 683 F.2d 1312, 1319 (11th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983).

City's Petition makes clear, there will always be some other civic program which demands its attention. (Pet. at 16) Fiscal constraints would always be available as a defense. The City took these constraints into account before agreeing to the consent decree in the first place. In the absence of a request for modification, it should not be able to raise them as a defense. As Chief Justice John Marshall said as long ago as 1809: "If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery. . . . " *United States v. Peters*, 9 U.S. (5 Cranch) 115, 136 (1809); *see also Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

San Francisco offers no reason to upset this settled authority. It had a remedy, which it chose not to exercise. It could have moved to modify the Consent Decree based on a showing of significantly changed circumstances. *See Rufo*, 112 S.Ct. at 760-62. Yet, neither before the overcrowding resumed nor at any time during the eight months that the contempt motion was pending did the City seek to modify the Decree.[11] Instead, it chose self-

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[11] San Francisco's strategic decision is not surprising. Modification would defeat a core remedial goal of the Consent Decree – to eliminate overcrowding. Because the court's orders merely set the population for the jail at the levels mandated by the California State Board of Corrections, they cannot be increased without violating the constitution. As this Court recently recognized in *Rufo*, 112 S.Ct. at 763, a modification must not create or perpetuate a constitutional violation.

Moreover, the population levels dictated the parameters of other provisions contained in the Consent Decree; the levels of staffing, medical and mental health care, time for recreation,

help. Now, at this late date, it wants to claim poverty as its excuse. That is exactly the "experimentation with disobedience" which this Court has condemned. *Rylander*, 460 U.S. at 756.

Finally, even were this Court to reverse its longstanding precedent and permit governmental entities to use fiscal constraints as a defense to contempt, it would not change the result here. The lower court considered the City's economic plight before issuing its contempt order. Appreciation for San Francisco's fiscal problems caused the court to postpone twice the hearing on contempt to afford the City ample time to develop a plan to remedy the overcrowding. The contempt order explicitly stated that "the court has recognized the difficult financial problems impacting the City and its various departments and has exercised great restraint in not imposing sanctions." (App. B-14) The district court reiterated its attention to San Francisco's financial problems at the hearing for reconsideration of the contempt finding.[12] (CR 570 at 9)

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and the like all depended on the number of inmates confined in the facility. These would all have to be changed if the capacity levels were relaxed. Modification is inappropriate if it will necessitate changes to all aspects of a decree. *See Rufo* 112 S.Ct. at 762.

[12] There was also ample evidence in the record that many of the alternatives available to San Francisco to remedy the overcrowding cost less than continued incarceration. The City could implement several alternatives – for example, electronic home monitoring or county parole – which were significantly cheaper than detention. The district court also permitted the City to early release inmates at up to 50% of time served. (App. B-18) San Francisco chose to challenge this free solution to the overcrowding problem on appeal. It should not be able to argue that fiscal constraints limit its ability to comply with court orders

C. SAN FRANCISCO CITES NO REASON FOR ALLOWING A DEFENDANT TO CLAIM UNFORESEEN CIRCUMSTANCES AS A DEFENSE TO CONTEMPT.

San Francisco asks this Court to grant certiorari to decide whether a defendant in a contempt proceeding must show that the circumstances giving rise to the violation were unforeseeable. (Pet. at 23). The City provides no reason why this issue need be decided. It does not point to a conflict between the circuits. *See* Sup. Ct. R. 10.1(a). It does not suggest that the Ninth Circuit's unanimous affirmance of the district court so far departed from the accepted course of judicial proceedings to warrant Supreme Court review. *Id.* Nor does it explain how resolution of this issue would make any difference to this case.

In fact, the Ninth Circuit's decision comports with this Court's teachings. As the Ninth Circuit correctly found (App. A-12 n.9), the moving party has the burden of showing by clear and convincing evidence that the contemnor violated a specific and definite order of the court. *Balla v. Idaho State Bd. of Corrections*, 869 F.2d 461, 466 (9th Cir. 1989). The burden then shifts to the contemnor to demonstrate why it was unable to comply. *United States v. Rylander*, 460 U.S. 752, 757 (1983); *Donovan v. Mazzola*, 716 F.2d 1226, 1240 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984). There is absolutely no dispute here

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when it has deliberately rejected a solution which would impose no costs. As its belated decision to rent beds in Alameda County shows, it is not money which thwarts compliance but a lack of political incentive.

that the district court orders were specific and definite and that they were violated. (App. B-10) The only issue was whether San Francisco had met its burden. *See Sekaquaptewa v. MacDonald*, 544 F.2d 396, 404 (9th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977); *General Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1379 (9th Cir. 1986).

The reason for the jail population's explosion, and San Francisco's ability to predict it, are irrelevant to this inquiry. This Court long ago held that good faith is not a defense to contempt. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949). Thus, whether the City should or could have anticipated the population increase has no bearing on whether it can be found in contempt.[13] The only issue is the efforts it took to comply with the governing court orders once it found itself in violation. Under San Francisco's theory, it could escape contempt if it proved it had not, however unreasonably, foreseen the circumstances giving rise to the violations. This is tantamount to asserting good faith as a defense to contempt.

Once again, all of this is academic. Even were this Court to reverse long-standing precedent, recognize unforeseen circumstances as an excuse for contempt, and remand the contempt finding for reconsideration, the result would not change. As the unanimous Ninth Circuit panel found, the 1991 upsurge in the jail population was in fact foreseen. (App. A-15) In 1989, the National Council on Crime and Delinquency published a report which

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[13] Unforeseen circumstances may, in some circumstances, be grounds for modification of a decree. *Rufo*, 112 S.Ct. at 760. But that is not at issue here since San Francisco chose not to seek modification of the underlying court orders.

predicted that San Francisco's jail population would reach 2109 inmates per day in 1992. (CR 424 at 7) In February 1990, the Special Master appointed by the district court to oversee implementation of the Decree, predicted the population would be 2055 inmates per day. (CR 438 at 29) Both predictions were very close to target.[14] (App. A-15)

D. THE COURT SHOULD NOT ISSUE AN ADVISORY OPINION ON AN ISSUE DECIDED IN SAN FRANCISCO'S FAVOR

Finally, San Francisco seeks an advisory opinion on the district court's early release order. It claims that although the Ninth Circuit vacated this portion of the order, it improperly implied that in the future the district

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[14] San Francisco ignores these predictions and now claims that the impact of the Tenderloin Task Force on the Jail's population was what was unforeseen. (Pet. at 22-23) The City should have known that creation of a special police task force in a high crime area would have increased the jail population. Three factors influence prison population: the number of arrests, prosecution policies, and sentencing and parole decisions. *Nelson v. Collins*, 659 F.2d 420, 426 (4th Cir. 1981) The Task Force was intended to influence all three.

Moreover, San Francisco had long been put on notice that it was responsible for any impact police policy changes had on jail population. Beginning in 1986, the Special Master repeatedly warned in his reports that increased police activity inevitably meant an increased jail population. (CR 329 at 34; CR 329 at 4; CR 446 at 27) He also reported that an increase in felony arrests inevitably reduced the possibility of releases. (CR 329 at 4)

court may consider 50% early release as a remedy for contempt if monetary sanctions fail to produce compliance with the court's population orders. (Pet. at 24) Because the lower court has not yet authorized 50% early releases, this issue is not ripe for review.

First, San Francisco cannot appeal an issue that came out its way. *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 333 (1980); *Perez v. Ledesma*, 401 U.S. 82, 87 n.3 (1971). "A party may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review or findings he deems erroneous which are not necessary to support the decree." *Roper*, 445 U.S. at 335, *quoting Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241, 242 (1939). As San Francisco admits, the Ninth Circuit vacated the portion of the contempt order authorizing 50% early releases. (App. A-33)

Second, the issue is not ripe for review. Although the Ninth Circuit implied that the district court might consider the early release remedy if fines fail to produce their desired effect (App. A-33), this has not yet occurred. The lower court has not yet considered whether the threat of sanctions are ineffective and whether other alternatives are inadequate. (App. A-33) Thus, there is no issue and no factual record for this Court to review. *See Wheeler v. Barrera*, 417 U.S. 402, 426-27 (1974)(request for writ of certiorari denied where district court had not yet formulated plan which was challenged on appeal), *modified*, 422 U.S. 1004 (1975); *California v. Green*, 399 U.S. 149, 169-70 (1970) (constitutional claim that evidence inadmissible was unripe because lower court had not originally addressed it, relevant facts were unclear, and other grounds might make issue unnecessary on remand).

CONCLUSION

For the reasons set forth above, this Court should deny San Francisco's Petition.

Respectfully submitted,

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